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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 134

HARRY SCHNELL AND SAMUEL SCHNELL, CO-PARTNERS DOING BUSINESS AS H. SCHNELL & CO., PETITIONERS,

vs.

THE STEAMSHIP "VALLESCURA", HER ENGINES, ETC., LLOYD MEDITERRANEO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 30, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

HARRY SCHNELL and SAMUEL SCHNELL, Co-partners, Doing Business as H. Schnell & Co., Libellants,

vs.

Steamer "VALLESCURA", LLOYD MEDITERRANEO, Respondent

STATEMENT

1925

Dec. 15. Filed libel and stipulation for costs and issued monition—Returnable December 29, 1925.

Dec. 28. Filed claim, stipulation for costs and stipulation for value.

Dec. 29. Filed monition—Attached notice given.

1926

Apr. 16. Filed answer.

Apr. 27. Filed exceptions to claimant's interrogatories.

Sept. 22. Filed note of issue and notice of trial (October).

1928

Nov. 21. Thomas D. Thacher, J. Case tried. Libellants—4 witnesses and 10 Exhibits. Claimant—Adjourned to November 22nd, 1928.

[fol. 2]

Nov. 22. Thomas D. Thacher, J. Trial resumed. Libellants—3 witnesses, 4 exhibits and 1 deposition. Claimant—3 witnesses, 6 exhibits and 1 deposition. Case submitted.

1929

Apr. 24. Filed opinion #5280—Thacher, J.—Enter decree for Libellant.

Apr. 24. Filed minutes of trial.

Apr. 27. Filed interlocutory decree with reference to William Parkin—Thacher, J.

1932

June 3. Filed order for commission to Italy—Mack, J.

June 3. Filed order for commission to Italy—Mack, J.

June 3. Filed order for commission to Italy—Mack, J.

June 22. Filed (3) cross interrogatories to B. Dulbecco, S. Irrera and G. Barone.

July 14. Filed interrogatories addressed to Captain Dulbecco.
July 14. Filed stipulation settling interrogatories to Captain B. Dulbecco.
July 14. Filed stipulation settling interrogatories to G. Barone.
July 14. Filed interrogatories addressed to G. Barone.
July 14. Filed interrogatories addressed to S. Irrera.
July 14. Filed stipulation settling interrogatories to S. Irrera.
July 14. Issued commissions—Genoa, Italy (Barone).
July 14. Issued commissions—Genoa, Italy (Dulbecco).

[fol. 3]

July 14. Issued commissions—Genoa, Italy (Irrera).

1933

Feb. 11. Filed commissions from Genoa, Italy (Barone) L. & R.
Feb. 16. Filed commissions from Genoa, Italy (Irrera) L. & R.
Feb. 16. Filed commissions from Genoa, Italy (Dulbecco) L. & R.
Apr. 13. Filed report of Commissioner—Total damages with interest to April 14, 1933—$14,475.14.
Apr. 13. Filed transcript of minutes of hearing before Commissioner.
Apr. 13. Filed exhibits before Commissioner.
Apr. 22. Filed exceptions to Commissioner's report. L. & R.
Apr. 24. Filed note of issue. Motion to overrule exceptions. Returnable April 28, 1933.
May 11. Filed notice of motion to overrule exceptions.
May 11. Filed opinion #7788—Caffey, J.—Exceptions overruled.
Report confirmed. Interest to be added on $11,262.71 from April 14, 1933.
May 17. Filed Bill of costs—$627.75—JJ.
May 18. Filed final decree. Libellant to recever $14,538.96 and costs of $627.75—Caffey, J. J. & J.
May 31. Filed note of issue. Order to show cause to make order of New York County Supreme Court effective, etc. Returnable June 2, 1933.
July 17. Filed notice of appeal and order allowing same —Bondy, J. L. & R.

[fol. 4]

July 17. Filed assignment or errors. L. & R.
July 17. Filed bond on appeal for $250.00—National Surety Company. L. & R.
July 17. Filed bond on appeal for $16,500.00—National Surety Company. L. & R.
Aug. 10. Filed stipulation and order extending time to file record on appeal to September 9, 1933.
Aug. 16. Filed order extending term of this Court to September 9, 1933—Patterson, J. L. & R.
Aug. 21. Filed consent to order permitting claimant to withdraw depositions and exhibits for preparing record on appeal—Patterson, J. L. & R.

IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable Judges of the District Court of the United States, for the Southern District of New York:

The libel and complaint of Harry Schnell and Samuel Schnell, co-partners, doing business as H. Schnell & Co., against the Steamer called "Vallescura", her engines, boilers, apparel and furniture, and against all persons intervening for their interests therein, in a cause of contract, civil and maritime, alleges as follows:

First: That on and during all the dates and times hereinafter mentioned, the Libellant was and still is a co-[fol. 5] partnership consisting of Harry Schnell and Samuel Schnell, doing business in the Borough of Manhattan, City of New York, under the firm name and style of H. Schnell & Co., and within the jurisdiction of this Court.

Second: That the Steamer "Vallescura" is now within the Port of New York and within the jurisdiction of this Honorable Court.

Third: That on or about the 5th day of November, 1925, Bautista Monton & Co. shipped and placed on board the Steamship "Vallescura", then lying in the Port of Gandia, Kingdom of Spain, 16,043 crates of onions, marked "Bautista Monton, Benjamin Brines and Lore Romen", in

good order and condition, to be carried to the Port of New York and there to be delivered in like good order and condition as when shipped to the order of Chatham-Phoenix National Bank & Trust Company, in consideration of the payment made of a certain freight. That thereafter, bill of lading was issued, signed and delivered to the shipper by the duly authorized representative of the S/S "Vallescura", marked "Bill of Lading #4".

Fourth: That on or about the 5th day of November, 1925, Bautista Monton & Co. shipped and placed on board the Steamship "Vallescura", then lying in the Port of Gandia, Kingdom of Spain, 766 half cases of onions, marked "Bautista Monton", in good order and condition, to be carried to the Port of New York and there to be delivered in like good order and condition as when shipped, to the [fol. 6] order of themselves, in consideration of the payment made of a certain freight. That thereafter, bill of lading was issued, signed and delivered to the shipper by the duly authorized representative of the S/S "Vallescura", marked "Bill of Lading #5."

Fifth: That on or about the 10th day of November, 1925, Bautista Monton & Co. shipped and placed on board the Steamship "Vallescura", then lying in the Port of Denia, Kingdom of Spain, 8,957 crates of onions, marked "Bautista Monton, Superior Onions", in good order and condition, to be carried to the Port of New York and there to be delivered in like good order and condition as when shipped, to the order of Chatham-Phoenix National Bank & Trust Company, in consideration of the payment made of a certain freight. That thereafter, bill of lading was issued, signed and delivered to the shipper by the duly authorized representative of the S/S "Vallescura", marked "Bill of Lading #10".

Sixth: That on or about the 10th day of November, 1925, Bautista Monton & Co. shipped and placed on board the Steamship "Vallescura", then lying in the Port of Denia, Kingdom of Spain, 433 crates of onions, marked "Bautista Monton" and 66 half cases of onions, marked "Bautista Monton #5", in good order and condition, to be carried to the Port of New York and there to be delivered in like good order and condition as when shipped, to the order of themselves, in consideration of the payment of a certain

freight. That thereafter, bill of lading was issued, signed [fol. 7] and delivered to the shipper by the duly authorized representative of the S/S "Vallescura", marked "Bill of Lading #9".

Seventh: That thereafter and on or about the dates mentioned on said bills of lading, the S/S "Vallescura", having on board the above mentioned merchandise, sailed from the said Ports of Gandia and Denia, Kingdom of Spain, and on or about the 8th day of December, 1925, arrived in the Port of New York, and attempted to make discharge of said merchandise, but not in like good order and condition as when shipped, but short, slack, and seriously injured and damaged by and through the negligence of the S/S "Vallescura", in respect to the loading, stowing, custody, care and proper delivery of the said merchandise, and by and through the unseaworthiness of the said S/S "Vallescura".

Eighth: That prior to the commencement of this action as aforesaid and prior to the arrival of the said S/S "Vallescura", your libellants, for a valuable consideration, became and still are the owners of the merchandise, and became and still are the holders and owners of the bills of lading of the said merchandise, and became and still are the owners of all the rights and causes of action in and to said shipment as aforementioned.

Ninth: That by reason of the premises, your libellants have sustained damages in the sum of Seventeen thousand, five hundred ($17,500.00) dollars, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

[fol. 8] Tenth: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libellants pray that process in due form of law and in accordance with the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said Steamer "Vallescura", her boilers, engines, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court will grant to the libellants a decree for the said sum of Seventeen thousand, five

hundred ($17,500.00) dollars, with interest and costs, and that the said vessel may be condemned and sold to pay the same, and that the libellants may have such other and further relief in the premises as may be just and equitable.

Joffe & Joffe, Proctors for Libellants, Office & Post Office Address: 141 Broadway, Borough of Manhattan, City of New York.

[fol. 9] *Duly sworn to by Harry Schnell. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ANSWER

To the Honorable Judges of the District Court of the United States, for the Southern District of New York:

The answer of Lloyd Mediterraneo, claimant of the steamship Vallescura, her engines, boilers, &c., to the libel and complaint of Harry Schnell and Samuel Schnell, co-partners doing business as H. Schnell & Co., in an alleged cause of contract, civil and maritime, alleges, upon information and belief, as follows:

First: The claimant denies that it has any knowledge or [fol. 10] information sufficient to enable it to form a belief as to the article marked "First" of the libel.

Second: The claimant admits the allegations of the article marked "Second" of the libel.

Third: The claimant admits that on or about November 5, 1925, Bautista Monton shipped and placed on board the steamship Vallescura, then lying in the port of Gandia, 16,042 packages said by the shipper to be crates containing onions and consigned to Chatham-Phoenix National Bank & Trust Company, and that a valid bill of lading was issued on behalf of the master covering the said cargo. Except as herein admitted, qualified or denied the claimant denies the allegations of the article marked "Third" of the libel.

Fourth: The claimant admits that on or about November 5, 1925, Bautista Monton shipped and placed on board the steamship Vallescura, then lying in the port of Gandia,

766 packages said by the shipper to be half cases containing onions and consigned to order, and that a valid bill of lading was issued on behalf of the master covering the said cargo. Except as herein admitted, qualified or denied the claimant denies the allegations of the article marked "Fourth" of the libel.

Fifth: The claimant admits that on or about November 10, 1925, Bautista Monton shipped and placed on board the steamship Vallescura, then lying in the port of Denia, 8,957 packages said by the shipper to be crates containing onions and consigned to Chatham-Phoenix National Bank [fol. 11] & Trust Company, and that a valid bill of lading was issued on behalf of the master covering the said cargo. Except as herein admitted, qualified or denied the claimant denies the allegations of the article marked "Fifth" of the libel.

Sixth: The claimant admits that on or about November 10, 1925, Bautista Monton shipped and placed on board the steamship Vallescura, then lying in the port of Denia, 499 packages said by the shipper to be 433 crates and 66 half cases containing onions and consigned to order, and that a valid bill of lading was issued on behalf of the master covering the said cargo. Except as herein admitted, qualified or denied the claimant denies the allegations of the article marked "Sixth" of the libel.

Seventh: The claimant admits that thereafter on or about December 8, 1925, the said steamship Vallescura arrived at the port of New York and it alleges that the said merchandise mentioned above was delivered to the consignee at New York in the same order and condition that it was in when received for shipment at the said ports of Gandia and Denia, and it denies that the said merchandise was not delivered in the same order and condition that it was in when received for shipment. Except as herein admitted, qualified or denied the claimant denies the allegations of the article marked "Seventh" of the libel.

Eighth: The claimant denies that it has any knowledge [fol. 12] or information sufficient to enable it to form a belief as to the truth of the allegations of the article marked "Eighth" of the libel.

Ninth: The claimant denies the allegations of the article marked "Ninth" of the libel.

Tenth: The claimant admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court. But it denies that all and singular the premises are true.

Further Answering and for a Complete and Separate Defense Herein

Eleventh: The claimant alleges that before there was shipped and put on board the steamship Vallescura at the ports of Gandia and Denia the merchandise referred to in the articles marked "Third," "Fourth," "Fifth" and "Sixth" of this answer, and at all times mentioned in this answer and the libel herein, it exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied pursuant to and in accordance with the terms and provisions of the Act of Congress of the United States of America, approved February 13, 1893, commonly known as the Harter Act. The respondent further alleges that prior to and at the time of the shipment of the cargo in question and at all the times mentioned in this answer and in the libel herein the said vessel was in all respects seaworthy and properly manned, equipped and supplied, and that if any loss or damage was sustained by the said merchandise, or any portion thereof, [fol. 13] such loss or damage was due to causes for which, under the terms and provisions of the said Act of Congress, neither the vessel nor her owner, master, agents or representatives were liable. The claimant claims and invokes the protection of the exemptions accorded the vessel and her owner by the terms and provisions of the said Act of Congress and denies all liability for any loss or damage that occurred through causes exempted by the same.

Further Answering and for a Complete and Separate Defense Herein

Twelfth: The claimant admits that on or about November 5, 1925, there was shipped and placed on board the steamship Vallescura, then lying at the port of Gandia, 16,043 packages said by the shipper to be crates of onions, and 763 packages said by the shipper to be half cases of onions, and that on or about November 10, 1925, there was shipped and placed on board the said steamship, then lying in the port of Denia, 8957 packages said by the shipper to

be crates of onions, 433 packages said by the shipper to be crates of onions, and 66 packages said by the shipper to be half cases of onions, all of which merchandise the claimant believes is the merchandise referred to in the libel, that the said merchandise was shipped by Bautista Monton and consigned to Chatham-Phoenix National Bank & Trust Company and/or to order; that the said merchandise was shipped in accordance with valid bills of lading signed and delivered to the shipper on behalf of the master by the [fol. 14] duly authorized agent of the said vessel; that the said bills of lading contain the following provisions:

"Shipped in apparent good order and condition by Bautista Monton in and upon the steamship Vallescura * * * the following packages, said to contain lawful merchandise as hereinafter specified * * * to be delivered from ship's deck, where the ship's responsibility shall cease, in the like apparent good order and condition, subject to the terms, conditions and exemptions from liability printed hereon * * *"

* * * * * * *

3. Weight, measurement, gauge, contents, quantity, quality, condition, brand and value unknown * * *"

The claimant denies that it has any knowledge or information sufficient to enable it to form a belief as to the contents of the said crates and half cases, or as to the condition of the alleged contents thereof. The claimant further denies that the said merchandise was not delivered in the same order and condition as it was in when received for shipment at the above mentioned ports.

Further Answering and for a Complete and Separate Defense Herein

Thirteenth: The claimant alleges that the said merchandise referred to in the articles marked "Third," "Fourth," [fol. 15] "Fifth" and "Sixth" were carried subject to contracts of affreightment set forth in the form of valid bills of lading issued on behalf of the master, which bills of lading will be produced as the exigencies of the case may require; that neither the master, owner, agents or representatives of the said vessel, nor any one on behalf of them, or either of them, made any contract other than that

set forth in the said bills of lading; that the said merchandise was carried under the terms and provisions of, and subject to, the conditions and exemptions set forth in the said bills of lading, and that among other provisions the said bills of lading provided as follows:

"1. Owners to be exempt from loss or damage caused by the Act of God, * * * loss or damage resulting from any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, * * * heat or fire at sea * * * unseaworthiness of the ship at the commencement or at any period of the voyage arising from breakage of shafts or any latent defect in hull, machinery, or appurtenances, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, stranding, straining, or other perils of the seas, rivers, * * *."

The claimant alleges that at all times mentioned in this answer and in the libel where the said merchandise was in the custody of the master, agents, or other representatives of the said vessel, all reasonable and due care and diligence [fol. 16] in the handling, stowing, discharging and in every way guarding and protecting said merchandise from loss, damage or injury was exercised; that during the voyage very severe weather was encountered, causing the vessel to labor heavily, roll, pitch, strain and ship large quantities of water; that if any loss or damage was sustained by the said merchandise, or any portion thereof, such loss or damage was due to causes for which, under the terms and provisions of the said bills of lading, neither the vessel nor her master, owner, agents or representatives were responsible, and was not due to any cause or event arising through any fault or negligence on the part of the said vessel, her master, owner, agents or representatives.

The claimant while specifically setting forth above certain provisions of the said bills of lading prays leave to refer to the same at the trial of this cause and submit the same in evidence and have the benefit of any and all provisions contained therein relating to the matter in controversy herein, including those enumerated above as well as those not so enumerated.

Further Answering and for a Complete and Separate Defense Herein

Fourteenth: The claimant alleges that the said bills of lading referred to above contain, among other provisions, the following:

"3. * * * Contents * * * and value unknown and not accountable for loss or damage resulting from [fol. 17] stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay, rain, spray, frost, thaw, effect of climate or heat of hold * * * deterioration in quality, defects, * * * contact with * * * or evaporation from any other goods, * * *."

The claimant alleges that if any loss or damage was sustained by the said merchandise, or any portion thereof, such loss or damage was due to causes for which, under the terms and provisions of the said bills of lading, neither the vessel nor her master, owner, agents or servants was responsible, and was not due to any cause or event arising through any fault or negligence on the part of the vessel, her master, owner, agents or representatives in respect to the handling, stowing, discharging, and in every way guarding and protecting the said merchandise from loss or injury.

The claimant while specifically setting forth above certain provisions of the said bills of lading prays leave to refer to the same at the trial of this cause and submit the same in evidence and have the benefit of any and all provisions contained therein relating to the matter in controversy herein, including those enumerated above as well as those not so enumerated.

Further Answering and for a Complete and Separate Defense Herein

Fifteenth: The claimant alleges that the bills of lading referred to above contain, among others, the following provisions:

[fol. 18] "8. Simultaneously with the ship being ready to unload the above mentioned goods, or any part thereof, the consignee of the said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge or into

lighters provided with a sufficient number of men to receive and stow the said goods therein, and in default thereof, the master or agent of the ship, and the Collector of above port, are hereby authorized to enter the said goods at the Custom House, and land, warehouse, or place them in lighter, without notice to, and at the risk and expense of, the said consignee of the goods after they leave the deck of the ship."

The claimant alleges that the consignee failed or refused to take delivery of the said merchandise, as provided for in the above mentioned provision of the bills of lading, and that if the said merchandise were damaged, or any portion thereof was lost, it was due solely to the failure of the consignees to take proper delivery of the said merchandise, as provided for in the above mentioned bills of lading provisions.

Further Answering and for a Complete and Separate Defense Herein

Sixteenth: The claimant alleges that the aforementioned bills of lading contain the following provision, among others:

[fol. 19] "10. The ship owner is not to be liable for any damage to any goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claims for damage or detention of goods under through bills of lading where the damage is done or detention occurs whilst the goods are not in the possession of the ship owner. • • •

• • • • • • •

22. The carrying company shall under no circumstances be responsible for any loss or damage whatever, caused or arising before the goods come within reach of, or after leaving the tackles of their vessel, for the purpose of transshipment or any other purpose whatsoever.

• • • • • • •

24. Notice of any claim arising under this bill of lading must be given by the consignee to the steamer's agent at the port of destination, within 48 hours after the landing

of, or failure to deliver goods, and the claim to be preferred within 90 days from the date hereof at the offices of the owner of the steamer * * *"

The claimant alleges that the libellant failed to give notice of any claim within 48 hours after the landing of the merchandise in question, as required by the aforementioned provision of the bills of lading; that the libellant failed to give notice of claim before the removal of the goods, as required by the said bills of lading; that if there was any [fol. 20] loss or damage the said loss or damage was capable of being covered by insurance; that if there was any loss or damage the same occurred while not in the possession of the ship or ship owner; and that if there was any loss or damage it occurred before the said merchandise came within reach of the ship's tackles or after the said merchandise had left the ship's tackles, in either of which cases the claimant is not liable for such loss or damage.

Further Answering and for a Complete and Separate Defense Herein

Seventeenth: The claimant alleges that the aforementioned bills of lading contain the following provision, among others:

"9. * * * In the event of damage, loss, non-delivery, or short delivery, ship owner not to be liable for more than the invoice value of the goods, less freight and all charges.

10. The ship owner is not to be liable for any damage to any goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods * * * nor for any package above the value of $200 unless bills of lading be signed therefor, with the value therein expressed, and a special agreement made."

The claimant alleges that the shipper did not declare [fol. 21] any value other than that declared in the clause referred to above, and that therefore if there was any loss or damage sustained by the said merchandise, or any portion thereof, in no case should recovery exceed the invoice value of the said merchandise, or $200 per package, whichever should be the lesser.

Wherefore the claimant prays this Honorable Court that the libel herein be dismissed; that this Court enter a decree for the claimant, together with all costs and disbursements; and that the claimant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

Loomis & Ruebush, Proctors for Claimant, 52 Broadway, Manhattan, New York City.

Duly sworn to by M. N. Giannoni. Jurat omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

INTERROGATORIES BY CLAIMANT

Interrogatories Propounded to the Libellant to Be Answered under Oath

1. How many of the alleged crates of onions were (a) damaged; (b) short; (c) slack?

2. How many of the alleged half cases of onions were (a) damaged; (b) short; (c) slack?

3. (a) State for each crate separately the percentage of damage to that crate? (b) State for each half case separately the percentage of damage to that half case?

4. (a) State for each crate separately the percentage of shortage in that crate? (b) State for each half case separately the percentage of shortage in that half case?

[fol. 23] 5. (a) State for each crate separately the percentage of slack in that crate? (b) State for each half case separately the percentage of slack in that half case?

6. If any individual case or crate showed damage and/or shortage, and/or slackage, state the percentage of each respectively?

7. In stating the above requested information, if you have not already done so, kindly state the mark or number of each case separately so that the percentage of (a) damage, (b) shortage, (c) slackage, may be determined for each individual case.

8. What was the nature of the damage to the alleged damaged cases and crates and half cases, stating in detail whether the alleged damage was the result of (a) breakage, (b) leakage, (c) sweating, (d) salt water, (e) heat, (f) decay, (g) rain, (h) wastage, (i) spray, (j) frost, (k) thaw, (l) effect of climate, (m) deterioration, (n) pilferage, or (o) of what other nature not herein specifically enumerated.

9. State (a) the kind of alleged onions and (b) their grade?

10. State the invoice value of each crate separately?

11. State the invoice value of each half case separately?

12. Attach to your answers to these interrogatories true copies of the consular invoice of the cargo in question, together with the shipper's declaration of value before the [fol. 24] consul, also the consul's certificate of the value (in dollars of the United States of America) of the currency in use at the ports of shipment at the time of shipment?

13. Was there any claim made by the consignee or any person on its behalf at the time the cargo in question left ship's side? If so, (a) state the date when such notice was given; (b) attach to your answers to these interrogatories a true copy of such claim as made?

14. Was there any notice of claim made by the consignees of the cargo within 48 hours after the cargo was landed from the ship's tackle?

15. If so (a) state the date when such claim was made, and (b) attach to your answers to these interrogatories a true copy of such claim as made?

16. Were the onions in question put into crates and half cases at the ports of Gandia and Denia, respectively?

17. If not, state where they were crated?

18. State how far in English miles it is from the places where the said onions were put into crates and half cases to the pier where the same were loaded onto the steamship Vallescura?

19. Were the said onions put into crates and half cases while the same were in the possession of the carrier or the

carrier's agent at the ports of Gandia and Denia, respectively?

20. If not, how long prior to the time they were delivered to the carrier for shipment were they put into the crates [fol. 25] and half cases, respectively.

Loomis & Ruebush, Proctors for Claimant.

In United States District Court, Southern District of New York

No. 91-109

Harry Schnell and Samuel Schnell, Co-partners, Doing Business as H. Schnell & Company, Libellants,

vs.

S. S. Vallescura, Respondent

Statement of Evidence.

Before Hon. Thos. D. Thacher, District Judge

New York, 3 P. M., November 21, 1928.

Appearances:

Messrs. Joffe & Joffe (Mr. Joseph Joffe), Proctors for Libellants.

Messrs. Loomis & Ruebush (Mr. Loomis), Proctors for Claimant.

The claims of the libel and answer are stated.

[fol. 26] Charles M. Lee, being duly sworn and examined as a witness for the libellants, testifies:

Direct examination.

By Mr. Joffe:

Q. Where do you live, Mr. Lee?

A. 499 West 158th Street, New York City.

Q. And you are employed by the United States Government?

A. Yes.

Q. In what department?
A. The Record Division of the Custom House, New York.
Q. And did you on behalf of your Department produce here the manifest as called for in the subpoena?
A. I have, yes, sir.
Q. Have you got it with you?
A. I have.

Mr. Joffe: I will introduce in evidence the manifest, dated Dec. 7, 1925, of the steamship Vallescura, produced by the United States Government from its files at the Custom House; and I wish to read into the record the master's oath on entry of vessel from foreign port; it shows that the vessel began its voyage at San Phelen——

Mr. Loomis: I suggest that you read it.

The Court: Go ahead and read such portions as you want.

Mr. Joffe: Voyage began at San Phelen on Oct. 30, 1925, and included the following ports, from which said vessel sailed in order, and on the dates stated, to wit: Palamos, 11/3; Gandia 11/4; Denia 11/12; Gibraltar 11/16; that is conceded to be November 16, and 11 indicates the month of November of that year.

(Received and marked Libellants' Exhibit 1, of this date.)

[fol. 27] Mr. Joffe: I further read from the Deputy Surveyor's certificate attached to said manifest, which is as follows: "We hereby return of our action in respect of the discharging steamer Vallescura from Gandia, which arrived at the port of New York Dec. 7, 1925, and discharged Dec. 12, 1925. E. G. Gans, H. E. Curran, Discharging Inspectors, Jan. 18, 1926. I have examined the above described return and certify it to be correct. G. M. Brewer, Deputy Surveyor."

(Received and marked Libellants' Exhibit 2 of this date.)

Mr. Joffe: I am reading now from the U. S. Inspectors' report of the differences between the manifest and the discharge, and particularly from the second page thereof: Bautista Monton, 13 crates Onions, consignee order, page or entry No. 2. I am now reading from the manifest indicating the different types of cargo on board. (To Mr.

Loomis) And we have a copy of this manifest, instead of my reading so many of these——

Mr. Loomis: We don't have them.

Mr. Joffe: Gandia Red pepper, 1850 cases; Denia, almonds, 22600; Peanut bags, 250 cases; onions, 25,446 crates, 832 half cases; 5000 marked half boxes, but it doesn't indicate what merchandise it was; if the Court please, I don't want to eliminate that. San Feliu, 27 cases, one used household furniture; 8 cases of used household furniture; 20 bales of corks, 15 bales of corks, 1,046 bales of cork shavings; 1069 [fol. 28] bales of the same cork shavings; 1500 of the same cork shavings; Palamos, 7976 crates of cork board; 101 crates of cork; insulation for lathing and slabs, 14 cases of cork bobbins, 88 bales of corks, 176 bales of cork discs, 1 bale manufacturing cork—altogether 9387 packages of different kinds of cork or cork waste.

The Court: What has the cork got to do with the onions?

Mr. Joffe: We will explain that after a while. That was a particular cargo as we will show; I am introducing this on the question of stowage. An additional 12,003 packages of different cork board and cork shavings.

Q. Did you produce also from the records of your Department the consumption entry on the merchandise shipped to H. Schnell & Company, and are the papers which I am holding in my hand the papers which I mention?

A. Yes, sir.

Mr. Joffe: I introduce and ask the Court to consider in evidence the original documents produced by this witness from the United States Custom House designated as Entry No. 11, 12,755 import No. 813,138 dutiable consumption entry Collection District No. 10, Dec. 14, 1925, Port of New York, imported by H. Schnell & Company, vessel steamship Vallescura. And I offer in evidence the original bill of lading attached to the said entry protest from the Department above mentioned, and ask the Court for permission to introduce copies of such bills of lading subject to the [fol. 29] comparison of my opponent.

(Received and marked Libellants' Exhibits 3, 4, 5 and 6, of this date.)

Mr. Joffe: I offer in evidence a copy of the certificate of the Department of Health which is part of the consumption entry to which mention was made, and ask for permis-

sion to introduce a certified copy so that I may return the one I hold in my hand to the United States Government.

(Received and marked Libellants' Exhibit 7 of this date.)

Mr. Joffe: I offer in evidence the report of the Acting Deputy Surveyor of the Treasury Department, the United States Customs Service, New York, under date of December 28, 1925, which is part of the consumption entry just mentioned, reading as follows: Dec. 28, 1925, The Collector of the Port of New York; Sir: Referring to Claim No. 9499, made by H. Schnell & Company under date of Dec. 10, 1925, relieving them on the records for allowance for any decay found to exist in their importation of 26,260 packages of onions ex SS. Vallescura, Dec. 7, 1925, entry No. 813,138: I have to report that the packages covered by the above entry were subjected to examination for the purpose stated, and return will be made in accordance with the results obtained.

(Received and marked Libellants' Exhibit 8, of this date.)

Mr. Joffe: I offer in evidence certified copy of the report of the refund of duty by reason of the commodity being [fol. 30] found unfit for human consumption under date of New York, Dec. 24, 1925, coming from the United States Customs Service under No. 159106, 138,138, and ask the Court to accept a certified copy issued by the United States Government instead of the original report.

Mr. Loomis: I don't see any statement on this paper to the effect as quoted about the goods being unfit for human consumption.

Mr. Joffe: I will withdraw that characterization; that is shown by the Board of Health.

(Received and marked Libellants' Exhibit 9, of this date.)

It is conceded that the endorsements on the bill of lading to H. Schnell & Company are genuine.

Mr. Joffe: (To the witness.) Will you please see that I give you back all of your papers, sir?

The Witness: Yes.

Mr. Loomis: I don't have any cross-examination, but I should like the witness to remain available, in case I want him to come back with any of these documents, if he may keep them in the Custom House so they may be available again.

(The witness is instructed by the Court to keep the papers so they may be available.)

[fol. 31] HARRY L. SILVERMAN, being duly sworn and examined as a witness for the libellants, testifies:

Direct examination.

By Mr. Joffe:

Q. Where do you reside, Mr. Silverman?
A. 9219-168th Place, Jamaica, New York.
Q. And what is your occupation?
A. Clerk.
Q. In what Department?
A. Department of Health of the City of New York.
Q. Have you produced the original records of that Department?
A. I have.
Q. Is that the original record of your Department taken off your files?
A. Yes, sir.

Mr. Joffe: I offer the record in evidence, if the Court please, and ask permission to read from it, that being an official paper which must be returned to the Department of Health of the City of New York.

The Court: Yes.

Mr. Joffe (reading): "Name, S. S. Vallescura, Location, Pier 3, Bureau of Registration No. —. Meat or vegetables or milk; condemnation weight 155,350 lbs. To the Chief of Division of Food Inspection, Department of Health, New York City, on Dec. 23, 1925, A. M., I made an inspection on the pier of the above, and condemned the following unsound foodstuffs: Cargo of Onions, consignee H. Schnell & Co., marks, Joseph Roman, Bautista Monton, marked packages 3,107, 3,090 crates, 17½ cases, received for con-
[fol. 32] demnation, result of overhauling. Consignee H. Schnell & Company, S. S. Vallescura. Yes. Date of arrival Dec. 5, 1925, ordered overhauled, No. Voyage No. Overhaul completed on 22/25; cargo discharged Dec. 12, 1925."

Q. You don't make these condemnations yourself?
A. No, sir.
Q. Do you know who the Inspector was who made the condemnation?
A. Yes.
Q. What is his name?
A. Walter Schailly.
Q. Do you know where he is now?
A. I do not.

No cross-examination.

MORRIS LEVY, being duly sworn and examined as a witness for the libellants, testifies:

Direct examination.

By Mr. Joffe:

Q. Mr. Levy, where do you reside?
A. 835 and 7 West 178th Street, New York City.
Q. And what is your occupation?
A. Inspector of Customs.
Q. At what port?
A. At the port of New York.
Q. And how long were you an Inspector of Customs at the Port of New York?
A. About nine years.
Q. And to what particular Department are you assigned?
A. Surveyors' Department.
Q. And how long have you been surveying cargoes coming into the port of New York?
A. About 7½ years.
[fol. 33] Q. And how long have you been surveying Onion cargoes in the port of New York?
A. For the same length of time.
Q. And the majority of these cargoes arrive from Spain?
A. The majority of them do—well it would be conjecture on my part to say whether they have onions coming from Alexandria, Egypt, which come in boxes and crated onions coming from Spain.
Q. Well, it isn't so important. Tell me how many cargoes do you examine as part of your duties as a surveyor of

cargoes in the port of New York, particularly with reference to onions?

A. For how long a period of time?

Q. During any one year. I don't want you to be exact, about how many?

A. I should say from about 50 to 70 cargoes.

Q. Did you pursuant to the order of your superiors make an examination of a cargo of onions on the steamship Vallescura in the port of New York on or about December 6, 1925?

A. Yes, sir.

Q. Did you make a survey of the cargo that came on the steamship Vallescura—I don't mean whether you make the survey on the ships, you don't make surveys on ships?

A. I don't make surveys, I make examination of the cargo when it is landed on the pier.

Q. You don't go into the steamer and examine it?

A. No, sir.

Q. Did you make such an examination of the cargo of onions on the steamship Vallescura sometime in December, 1925?

A. Yes, sir.

Q. Have you produced the original record of your determination as to that examination?

A. Yes, sir.

[fol. 34] Q. Will that record refresh your recollection as to what you did and what you examined and what you found?

A. Yes.

Q. Will you please consult that record?

Mr. Loomis: Did you make that record?

The Witness: Yes. Do you want me to read the record?

Q. No. Does it refresh your recollection?

A. Well, I have, since yesterday I have covered the record and I think I could answer your questions with reference to this examination from memory.

Q. Before I ask you the next question, is the certificate Exhibit 9 introduced here a certified copy made from the records of your Department as to your examination?

A. I will have to compare that with my official here, if you will allow me.

Q. Well, go ahead.

A. Yes, sir.

Q. Is the record Exhibit No. 9 an exact copy of your original record on file with your Department?

A. With the exception of the individual quantities of the various sized crates, in my record, my record here is a transcript of the Custom House permit, which shows the total quantity irrespective of sizes, while this record here shows the quantities with the individual sizes of crates, which is now shown in this record; with the exception of that, and in so far as it relates to percentages or degree, it agrees with my record.

Q. Do you remember your examination of this particular cargo?

A. Well, since I have been subpoenaed; of course, prior to that I don't remember, but since I have refreshed my [fol. 35] memory, and my name appears on this record, I must answer Yes.

Q. You mustn't answer Yes unless you remember the examination of that cargo. What do you mean, Yes or No.

A. Yes.

Q. Where did you examine it?

A. At Pier 3, Tomkinsville, Staten Island.

Q. Did you examine Spanish onions cargo before that date?

A. Yes, sir.

Q. For how many years?

A. Prior to December, 1925——

The Court: He said he had been doing it for seven years.

Q. Will you please tell us exactly what you did with reference to the examination, and what you saw and what was the condition of the cargo on that day when you saw it.

A. Well, my authority to examine a cargo is from a certain application called a claim for allowance for decay, which is filed by the Custom House.

Q. That claim is made for refund of duty, isn't it?

A. That claim advises the Collector to make an examination of the onions and to determine what allowance shall be made on account of decay under the provisions of the section or paragraph—Section 505 of the Tariff Act.

Q. Now, will you please tell us—we will assume your authority for purposes of examination—tell us what you saw and what you found and your description of the cargo as you saw it.

A. Upon receipt of this so-called claim for allowance of decay I proceeded to the pier.

Q. Do you remember what date?

A. On December the 21st.

[fol. 36] Q. Yes.

A. And the representative of the importer was there and I apprised him of this so-called claim and inquired as to whether they wanted me to take action on it, which is the usual procedure; he said Yes, and he designated his packers to open up a certain percentage, a representative portion of the crates which were singled out by myself. Now, there were three sizes of crates, 32s, 50s and 72s respectively, and half cases. The entire lot was examined, that is to say about 15 per cent. of the importation. Of the 32 size there was about 65 crates examined, and the result of the examination showed about 48 or 49 per cent decay. Of the 50 size, which were in the majority, there was about 800 crates examined, and that showed a percentage of decay amounting to about 56 per cent, and the 72 size crates about 500 were repacked in bags, and that showed about a 48 per cent decay; and finally the half of the cases 42 were repacked under our supervision and that showed about a 32 per cent decay.

Q. The packages that are examined are taken at random at your demand; you pick them out and tell them what packs to take?

A. Yes, sir.

Q. What examination did you make of these onions, did you handle them in your hands?

A. Well, the onions are handled mostly by the packers under my direction, or under my supervision; my purpose is to see that the onion which is really decayed, is discarded in order to insure an accurate examination.

Q. And will you please tell us what you saw as to the condition of the onions.

A. Well, I had occasion to at random pick up an onion to examine it, as it is my duty to do it, and most of the [fol. 37] onions that I picked up, as near as I can remember, were slimy beneath the skin.

Q. Did you open the onions, cut them?

A. Occasionally I would cut one to see whether the decay permeated the heart of the onion.

Q. And what did you find?

A. Well, in most of the onions I examined they were pretty sound in the heart.

Q. That is the decay came from the outside of the onion?

A. Most of them.

Q. What was the condition of the onion as known in the trade?

A. Well, they term it as cooked, or baked—words to that effect.

Q. And what does that designation——

Mr. Loomis: May I object to that, your Honor; I think I can see the purpose of it and I don't think it has any proper place in the record, for this witness to describe the condition of these onions by some peculiar trade name as cooked or baked.

The Court: What he calls it doesn't make any difference. What is the use of saying some person described the case as so and so, what we are interested in is what the condition of these onions was. If you were dealing with somebody's admission in regard to the onion who used that term you might do it, but here is the man who saw the onions.

Q. Will you please describe in more detail the condition of the onions which you saw discharged from the steamship Vallescura?

A. Of course, it happened so long ago, it is hazy, and I [fol. 38] have some recollection on account of the extraordinary amount of decay, but most of the onions I picked, as near as I can remember, were more or less slimy; some may have had a little bud, but the majority of them were under the skin.

Q. From your examination of these onions which you made in the past, as Inspector of Foods connected with the United States Government, are you in a position to say from your experience what caused such condition, or the approximate cause of such condition?

A. In my capacity as an inspector I am not required to determine the region of the decay.

Q. I didn't ask you that; are you in a position to answer after making that examination what was the approximate cause of the condition you saw?

Objected to.

A. I could only hazard a guess.

Cross-examined.

By Mr. Loomis:

Q. Mr. Levy, just one or two questions: You did say, did you not, that you had been examining from 50 to 75 cargoes during the 7½ years?

A. Approximately I suppose—I might correct that by saying 50 or 75 importations.

Q. Importations which might not include——

A. A cargo would mean a collection of importations.

Q. One steamer might include several importations?

A. That is right.

Q. And I suppose that all of those examinations you made were made because similar applications for claims for refund of duty had been made?

A. Yes, sir.

[fol. 39] Q. And those examinations were made on the piers where the onions had been discharged?

A. At the piers, and in a few instances, not many, at so-called weight auction sales rooms.

Q. And in those 50 or 75 cases yearly would you similarly have the onions re-packed and the bad assorted from the good?

A. Yes, sir.

Q. And in those 50 or 75 cases did you find that the claims were good and that the refund should be made?

A. In some instances cargoes were in pretty good shape, and in other instances they had a slight amount of decay, just a small amount, and in rare cases, of course, a high percentage of decay.

Q. I haven't asked about the percentage; I asked whether you allowed a claim for refund in the cases you examined?

A. Whether I had allowed a claim?

Q. Yes, whether you had approved the claim for a refund to be made?

A. I didn't approve the claim, but I reported the result of the examination.

Q. In all of the cases you examined you did find some decay, did you?

A. Yes, sir.

Q. In all the 50 or 75 cargoes a year you do find some decay

A. Some decay.

Q. And in those cases that you find some decay you report that back to the Customs authorities, and on the basis of that any allowance for refund is made?

A. Yes, sir.

Q. So there was nothing strange or unusual about your reporting decay in the other cases as well, is that true?

A. Yes, sir.

Q. Now, you didn't see these onions on the pier until the 2nd of December, did you?

A. I believe my examination took place on the 21st of [fol. 40] December to the 28th; I will have to refer to this book; for I looked over this yesterday when I got my subpœna.

The Court: Just look again.

The Witness: The examination was made from the 14th to the 21st, inclusive.

Q. By you?

A. Yes, sir.

Q. I thought you said you hadn't done it until the 21st; I thought you said you had not gone to the pier until the 21st of December?

A. No, according to this record here I must have been on the pier the 14th; if I said the 21st it was the first time I made a mistake.

Q. Well, then, your previous testimony you mean to say was wrong?

A. Beginning the 21st was wrong, yes.

Q. You are sure now that you went over on the 14th?

A. The 14th to the 21st, inclusive.

Q. When you went on the 14th, had all of the onions been discharged from the ship?

A. I coudn't say, I presume though they had, the ship arrived——

Q. Do your records there indicate——

A. I wouldn't make any such statement, because that would be indicated in the Inspector's manifest record.

The Court: He asked you if your records showed how long you were there.

The Witness: Yes, sir.

Q. How long were you on the the pier?

A. Do you mean during the course of the day?

Q. Yes.

A. I should say at least——

[fol. 41] Q. Does your record show?

A. No, sir; it just gives the month, the day and the year.

Q. Is there anything in your record that states that you were there at the pier on the 14th?

A. In the record introduced, or my own record here?

The Court: Just read the entry that you showed me, where it says, Commenced—

The Witness: Commenced December 14, 1925, finished December 21, 1925, examination at Pier 3, Tompkinsville, Staten Island, Discharging Inspectors, L. L. Petersen and H. E. Curran, Repacking by importers later.

By Mr. Joffe:

Q. May that not refer to the discharging of these goods from the steamer, since you name the inspectors there you said the inspectors would attend to the watching of the goods discharged from the steamer?

A. No, this record has nothing to do with the discharging inspection.

Q. Why do you mention their names?

A. This book is so gotten up that the regulations require the insertion of their names for a matter of record in case they have a return.

Q. But their duty relates to the discharge?

A. Their duties are confined to the supervision or the unloading of the vessel.

Q. Well, that is just the point, inasmuch as that entry reading Commenced 14th December and finished 21st December is coupled with their names, isn't it a fair assumption to make that those two dates refer to the two dates [fol. 42] during which the unloading of the steamer was in progress? Don't you know that she arrived here on the 12th?

Objected to.

A. The ship previously entered on the 7th.

Q. But the discharge?

A. That I don't know.

Q. Isn't it a fair assumption to make that those entries saying Commenced 14th and finished 21st refer to the discharge of the onions from the ship rather than to your examination of the onions after they were discharged from the ship?

A. No, sir.

By the Court:

Q. What do they refer to?

A. These here dates refer to the dates that I actually examined the cargo. The first date—

Mr. Joffee: What were you going to say?

The Witness: The 14th there mayn't have been sufficient cargo landed for me to make examination, and the——

Q. Are you able to say you examined some onions on December 14th?

A. I examined size 32 crates and size 50 on the 14th, 15th, 16th and 17th, and the 72 on the 18th and 19th, and the half cases were examined on the 21st.

Q. And those are all entered in your book under those dates?

A. Those are all entered in my book under those dates.

By Mr. Loomis:

Q. Can you tell me how long you were on the pier on those respective dates?

A. I should say six hours or so in the course of a day, [fol. 43] perhaps seven hours; I usually allowed a little time to travel back and forth from Staten Island.

Q. You have no independent recollection of that except from your records there?

A. I had to refer to the records because I examine so many cargoes of all descriptions I would have to refer to the record.

Q. You have no independent recollection of the matter except from the entries in the book?

A. None.

Q. Prior to your examination had any of the onions been re-packed or re-conditioned?

A. Prior to the examination—they may have been, but I can't say for sure.

Q. Of course, if they had been repacked before you examined them and the bad onions assorted from the good——

A. Yes, sir.

Q. It wouldn't be a fair test, would it, as to what the crates would have shown prior to the re-packing?

A. No, sir, it wouldn't.

Redirect examination.

By Mr. Joffe:

Q. Now, Mr. Levy, when you were asked as to the examination of 75 importations—you are only examining cargo on which claim is made for refund of duty—is that correct?

A. Yes, sir.

Q. So that before you make an examination there is already a claim that something is due from the Government for the refund of duty, is that correct?

A. Yes.

Q. And you only have to report as to what you find?

A. Yes.

Q. Now, let me put to you this plain language: After you examined your record, do you now remember just how that cargo looked, just now I mean without refreshment [fol. 44] of memory by your record? Do you picture, if I may use the expression, the cargo that you examined on December 21st at Pier 3, Tompkinsville, Stapleton, —— County, New York, can you now picture the cargo?

A. Onions all look alike in every cargo; the only thing I remember about it there was an unusual amount of decay, a very rare case, and they showed—I remember an instance, and I believe it was this particular ship, or there was a cargo that was landed in Staten Island——

Objected to.

Q. I only want you to tell us and the Judge and all of us will understand your hesitations—do you remember the cargo now after you have read you book and gone over it since yesterday, as you explained it here?

A. Well, that question you asked me at the beginning as to the kinds of decay; I stated that those onions that I picked up to examine, that I occasionally cut open to see the source of rot or decay showed slimy——

Q. So you do say——

The Court: Let him answer.

A. (Continued.) And some showed of course the usual decay from the stem of the bud, most of them were slimy and showed if picked up—would feel warm, so to speak.

By the Court:

Q. Is that your present recollection?
A. That is all my recollection.
[fol. 45] Q. You have a present recollection to that extent?
A. Yes.
Q. You have now a present recollection?
A. Yes, sir.

By Mr. Loomis:

Q. Have you been told that there were out of the entire shipment of some 26,000 cases or crates—there were only 3,000 that were condemned? Do you know that?
A. Yes, sir.
Q. Now, that will indicate a percentage of only about 11 per cent., wouldn't it. How can you reconcile the percentages you have been testifying to about 50 and 60 per cent. damage in a crate with the fact that only 11 per cent. or 12 per cent. of the whole shipment was condemned after they had been re-packed and overhauled?
A. Well, I might state that when they repack under the provisions of Sec. 502 for allowance for decay the regulations require them to repack at least five per cent. of the lot of packages picked out here and there by me along the pier, and they have the option of re-packing 100 per cent. if they desire; in most cases they don't desire to avail themselves of the 100 per cent. re-packing for various reasons, perhaps for that of expense, and they just repack, and they continue what is known as plugging.

The Court: What do you mean by that?
The Witness: It means where a rotten onion is apparent from the outside, it is replaced by a good onion, but the whole crate is not——

[fol. 46] Q. But yon don't think the importer, where he had 50 or 60 per cent. decay in a case would treat it as a sound case, do you?
A. In this particular case they may have delivered from the pier without re-packing.
Q. But you don't know anything about it?
A. I know it was a practice——
Q. But you don't know anything about that at all?
A. I don't know anything about that at all.

Q. If there had been a re-package corresponding to what you found in the way of percentage of damage, instead of 3,000 cases being condemned, 13,000 should have been condemned, shouldn't they?

A. 13?

Q. Yes, 13,000?

A. I wouldn't say 13. There is 38, and 42 for the half cases——

Q. Didn't you say 56 for one——

A. Of course, the crates would average 50, but then there is half cases only 32 per cent.

Q. There were not very many of those?

A. About 800 and some odd.

Q. It would be approximately half of the ship; that would be bad on the basis of your percentage?

A. Yes.

Q. And yet you know that there were only 3,000 out of 26,000 condemned after they were repacked?

A. Of course, I don't know that.

The Court: You ought to explain what you mean by condemned.

Mr. Loomis: Condemned by the Board of Health.

The Court: Do you know how many were condemned by the Board of Health?

The Witness: No, sir. It is in the record.

[fol. 47] Q. And how many cases do you think altogether you examined?

A. I examined about 1400 packages of the various sizes.

Q. Out of the entire 26,000?

A. Yes, sir.

By Mr. Joffe:

Q. And you picked out the packages yourself for the examination; you suggested, I mean, the packages to be examined?

A. I selected packages, getting representative packages, and required the importers' labor to do the re-packing.

Q. Now, Mr. Loomis asked you whether it was possible for anyone to repack the cargo before you arrived and for you to examine a repacked package; do you know the difference between an original package and a repacked package?

A. Yes, sir.

Q. Could you tell by looking at it?
A. Yes, sir.
Q. So would it be possible for anyone to mistake in examination a re-packed package for an original one?
A. No, sir.

By Mr. Loomis:

Q. You did say that you couldn't tell whether they had been re-packed or not when you saw them?
A. You didn't make your question quite clear enough when you asked me that; I thought you meant when I approached the pier the first time whether I thought the packages I proceeded to examine were re-packed or not.
Q. Well, did you know whether they were repacked or not?
A. They had been re-packed before.
[fol. 48] Q. I thought you told me right after that that it would have made a big difference in the percentage of bad onions you found in the crate if the re-packing had been done before you made your examination?
A. The re-packing hadn't been done before.
Q. Didn't you say it would have made a big difference?
A. The way I understand the question——

By the Court:

Q. I rather gathered that what you meant was that you made a difference in the Health Department, is that it? You were asked to explain the difference between what your records show and the action taken by the Health Department, and then you wandered off into a statement of re-packing; that was when the question first came up, and then you said that these cases might have been re-packed in such a way to explain that difference; now just what did you mean by that?

A. I misunderstood his question; I thought the question put to me was whether they began re-packing the onions irrespective of my examination, that is what I thought the question meant; but if you meant whether I thought the packages were re-packed before I made the actual examination of those packages, I say no, they were not re-packed, because the packages are selected by me, and if any package shows that it has been re-packed it would show evidence

in it of the breaking of the wire or the re-hammered nails in the crate, it would be easily detected by a man doing the work.

[fol. 49] By Mr. Loomis:

Q. I understand you now to say that you think they had not been re-packed when you examined them?

A. Those that I actually examined were not re-packed before I made the examination.

Q. If they were re-packed they would be better onions, wouldn't they?

The Court says they weren't re-packed.

By the Court:

Q. Let me ask you: Have you any recollection whether the condition you found in these boxes of onions that you did examine was more or less uniform with respect to all of the boxes you examined?

A. Yes, sir, they would be five per cent. re-packing of a lot——

Q. Don't bring in re-packing. You went to this dock as I understand it and you examined certain cases or packages of onions; you have told us that you found these onions in the condition that you have described; I now ask you whether the condition was a condition which was uniform with respect to all of the boxes you examined or not?

A. Yes, sir.

By Mr. Loomis:

Q. And did you notice whether the onions were chiefly damaged on the outside of the box or on the inside of the box or crate, at the heart of the crate, or whether the damage was uniformly spread throughout the crate?

A. Well, I can't remember that, coming down to the fine points——

[fol. 50] Q. That isn't a very fine point; you told counsel for the libellants a moment ago that you had a picture of the thing independently of the little book you hold in your hand; now you say you examined 1400 crates there; can't you tell me how the damage was spread out throughout the crate, or was it concentrated in some particular part of the crate?

A. No, it was spread throughout the crate.

Q. Uniform throughout the crate?
A. Uniform throughout.

HARRY SCHNELL, being duly sworn and examined as a witness for the libellant, testifies:

Direct examination.

By Mr. Joffe:

Q. Where do you reside, Mr. Schnell?
A. Lawrence, Long Island.
Q. That is in Nassau County?
A. Nassau County.
Q. Where is your place of business?
A. 323 Washington Street, New York City.
Q. Are you in partnership with your brother?
A. Yes, sir.
Q. What is his name?
A. Samuel Schnell.
Q. You were the consignee of the large cargo of onions received from the steamship Vallescura in December, 1925?
A. Yes, sir.
Q. How long have you been in the business of importing Spanish or other foreign onions?
A. About 16 years.
[fol. 51] Q. And what is the approximate amount of cargoes received during any one year?

The Court: I really don't care.
Mr. Joffe: I want to qualify him as an expert, your Honor, that is the reason I am asking him—not to show his importance.
The Court: All right, go on.

A. Over half a million packages a season.
Q. And how are the Spanish onions packed that come into this country?
A. In crates; that crate there (pointing to one in the Court Room) represents the packages of Spanish onions.
Q. That is the smallest package that comes into this country?
A. That is the smallest, and there are other sizes.
Q. What other sizes—how are they packed?

A. Half cases, also full cases.
Q. What is the approximate weight of a crate?
A. From 46 to 48 pounds.
Q. And a half case?
A. 65 to 68 pounds.
Q. And of a case?
A. 138 pounds.
Q. And are all of the packages that come into this country from Spain packed the same way whether they are shipped to you or any other importer in the United States?
A. Yes, sir.
Q. Now, do you remember the steamer Vallescura?
A. Yes, sir.
Q. Did you have occasion to go on the pier at the time of the arrival of the steamer?
A. Yes, sir.
Q. When did you go on the pier?
A. The 7th of December.
[fol. 52] Q. What pier did you go to?
A. It was Staten Island, one of the very old piers, a wooden pier I believe it was.
Q. And when you arrived on the pier was the steamer docked?
A. Yes, sir.
Q. Were the hatches opened?
A. No.
Q. Did you wait till they were opened?
A. Yes.
Q. Did you go on the steamer?
A. As soon as the deck cargo was discharged then they opened the hatches.
Q. What was the deck cargo if you know?
A. Cork.
Q. Did you see whether the deck cargo covered the hatches?
A. Yes, sir, it covered a lot of hatches and other space on the steamer.
Q. That is, the deck was solidly covered, including the hatches?
A. Not the whole deck, but wherever there was no passage—that is they left passage for them to pass.
Q. Did you wait until the hatches were open?
A. I waited until they untied the canvass on the hatches and they opened up the hatches.

Q. Did you see the cargo of onions in the hatch?

A. No.

Q. Did you look for it?

A. I was on the deck looking down in each and every hold but I didn't see no onions.

Q. What did you see?

A. Some dried fruit, like almonds, I believe, raisins, and some peanuts or some other commodity.

Q. How long did you remain on the pier?

A. I remained on the pier till some onions commenced to come out from the hatches.

Q. Did you examine the onions that came out from the [fol. 53] hatches?

A. I have examined them, yes.

Q. And please describe the condition of the onions?

A. The onions were in very poor condition, decayed, overheated and slimy.

Q. Did you open any crates or packages of onions?

A. Yes.

Q. Just explain it?

A. I opened some crates and I took out the onions and I examined every one, and I was on the pier for quite some time seeing to quite a few onions which were out, and after I was all through with the examination I went back to my office.

Q. Did you see any onions open?

A. Plenty.

Q. And please describe what you found on cutting them.

A. I found the onions inside were O K, the damage was on the surface, the first, second and third tiers.

The Court: What do you mean by that, tiers?

The Witness: The first three skins.

Q. After the examination which you have just described did you go back to the steamer?

A. I was back on the pier several times.

Q. I want to know whether you went back on the steamer —did you go back to look at the hatches after they started to discharge the onions?

A. No, I didn't go back any more after I saw how the onions came out. I was more than entirely blue about the cargo.

Q. From your experience in examining onion cargoes can you tell the approximate cause for the condition described by you in the cargo found on the steamer Vallescura?

[fol. 54] Objected to.

Sustained as to the form.

Q. Are you in a position to state the approximate cause of the condition of the cargo as described by you as you found it on the steamer Vallescura?

A. Yes.

Objected to—he didn't see it.

The Court: He has answered, I will let it stand.

Mr. Joffe: If that is your objection I will withdraw it; I have no intention to tell him, he examined it on the steamer.

Q. Will you tell us what in your opinion was the approximate cause of the condition in which you found the onions?

Mr. Loomis: Objected to.

The Court: Objection sustained; I assume the objection is not as to the qualification of the witness.

Q. Have you see different cargoes arriving in the port of New York for the last 16 years?

A. Yes, sir.

Q. And have you had occasion to investigate the cause of the condition of such cargoes from time to time?

A. Yes.

Q. Have you seen cargoes prior to the arrival of the Vallescura on December 5 or 7, 1925, that were damaged by lack of ventilation?

Objected to.

The Court: We all know that onions are damaged by lack of ventilation—certainly in this Court—what of it? [fol. 55] If you want to prove what happened on the ship you will have to get the people who saw them.

Mr. Joffe: The purpose of my——

The Court: Don't offer perfectly incompetent opinion from a witness who says he can't make his answers with any certainty whatsoever.

Mr. Joffe: It isn't the first time we are offering this Court such testimony.

The Court: This isn't the first time that it has been accepted—it hasn't been accepted at all, by me.

Mr. Joffe: Not by your Honor;—the purpose of this proof is to show that a person who deals in onions for years is able to examine an onion and tell from its condi-

tion what caused that condition. It is true I may be able to prove that by other witnesses who saw the trip and were there, but those witnesses are usually the people in the employ of the Steamship Company. I intend and desire to prove by this witness that the condition of these onions was caused, in his opinion, from his experience, by certain conditions—I don't want to mention them so I would be stating what they were—and it is for that purpose I am asking these questions.

The Court: You haven't gone about it in the right way.

Mr. Joffe: If the objection is that my questions are not proper——

The Court: I will have to rule on your questions as you put them.

[fol. 56] Q. Now Mr. Schnell, have you seen cargoes prior to the arrival of the Vallescura on December 5 or 7, 1925, that were damaged by lack of ventilation.

Objected to.

The Court: Objection sustained. He may answer it if you want.

Mr. Loomis: He would have to speculate there.

A. Yes.

Q. Have you in your experience as a dealer in onions had occasion to store onions?

A. Yes, sir.

Q. Have you watched the storing of onions and seen the different effects and studied the different effects on such onions of the lack of ventilation?

A. Yes, sir.

Q. Are you in a position, from all your experience as you have described, to tell from an examination of the onion what caused that condition?

A. Yes, sir.

Q. Can you tell us, Mr. Schnell, from your examination of onions on the steamer Vallescura, with any amount of certainty, what was the approximate cause, in your opinion, of the damage to the onions as you found them?

Objected to.

Sustained as to form.

Q. Can you tell us, Mr. Schnell, from the examination of the onions that you made in this case on the steamer

Vallescura, and from your past experience, with reasonable [fol. 57] certainty the proximate cause of the damage to the onions as you saw it?

Mr. Loomis: Objected to. This witness never saw the onions until they came out of the ship and were on the pier; he confessedly doesn't know what their condition had been, where they were picked, how they were stowed and where they were stowed; it is pure conjecture.

The Court: He may answer the question Yes or No; taking into consideration all of the circumstances that might have produced such an effect he may answer whether he can state with reasonable certainty that any particular cause was a cause of this damage.

Q. You heard what the Judge said?
A. It is a——
Q. Now——
A. Yes.
Q. Will you please tell us what it was due to?

Mr. Loomis: I object.
The Court: You may cross examine the witness.

Cross examined by Mr. Loomis:

Q. You didn't see the onions until they came on to the pier?
A. I saw them when they removed the cargo from the onions, I saw them inside the hatch.
Q. Did you see any damaged onions when they came on the pier?
A. No; I saw them on the pier.
[fol. 58] Q. You didn't see any damage in the ship—you didn't see any onions on the ship at all?
A. I didn't examine them on the ship.
Q. You didn't see any onions on the ship at all?
A. I saw the onions in the hatch after the cargo was removed.
Q. I thought you said you didn't see any onions when you looked into the hatch?
A. I couldn't see them until the other cargo, the almonds and raisins and other cargo that was on top was removed.
Q. Well, you don't mean to say that you know where the onions were stowed, do you?
A. I saw them inside in the hatches.

Q. Can you tell us where they were stowed?
A. They were stowed in the front hatches.
Q. In what holds?
A. I believe it was in 1, 2 and 3 holds, to the best of my recollection.
Q. What are the agencies that cause decay in onions?
A. Excessive heat.
Q. By agencies I mean——
A. Poor stowage.
Q. What is the thing that makes the decay—what is it that really decays the onion?
A. Bad stowage.
Q. Isn't it bacteria?
A. No.

By the Court:

Q. Are you assuming those facts in undertaking to make this answer?
A. That onions of the nature that those came in, it is not——
Q. You said they were properly packed and selected—you are assuming all that?
A. Yes.

The Court: Objection sustained. You have been simply [fol. 59] wasting time for half an hour; I know as much as he does—that they decay if they don't have enough ventilation. How can he go to a dock and say it happened by something on the vessel; he says it happened after they went on, they were decayed by your men that he employed. Go on to your next question.

By Mr. Joffe:

Q. When you saw the onions in the hatch, Mr. Schnell, did you see any spaces left for ventilation?
A. No.
Q. Did you immediately upon examination of the onions report the condition of them on the dock?
A. When I got back to the office I reported to the steamship agents.
Q. I mean before you left the dock, did you speak to the delivery clerk or superintendent of the dock?
A. I don't recollect that, there were several men, I don't remember who it was in particular.

Q. Was anyone with you in examining the onions?
A. My brother.
Q. Anyone else?
A. I also had one of the men working for me who was also on the pier to open up the packages.
Q. Was Mr. Gil with you?
A. Mr. Gil was on the pier as well.

Cross-examined by Mr. Loomis:

Q. Mr. Schnell, where was this pier to which you went?
A. Staten Island.
Q. You don't remember the number?
A. I think it was Pier 3.
[fol. 60] Q. What time in the morning did you get there?
A. Early before noon.
Q. Well, what time?
A. Between nine and ten o'clock.
Q. And you mean to say that they hadn't started discharging any of the cargo at that time?
A. Not the onions, they had discharged the cork from the deck of the steamer.
Q. But by the time you got there they had discharged the cargo of cork?
A. No, they were working on the cork.
Q. What I asked you was whether when you arrived there the discharge had commenced?
A. The general cargo?
Q. Had discharging from the ship commenced when you got there?
A. I saw the cork being discharged.
Q. That was the cork that was being discharged, was it?
A. Yes.
Q. Was that being taken out of the hatches of the ship?
A. From the top of the deck.
Q. That was being taken from the top of the deck?
A. Yes.
Q. Wasn't any being taken out of the hatches?
A. No.
Q. And you didn't go on board the ship while the cork was being discharged?
A. No.
Q. You waited until it had all been discharged?
A. Yes.

Q. Did I understand you to say on your direct examination that you had seen cork stowed on top of the hatches?

A. Yes, sir.

Q. You don't know whether that had just been placed there temporarily while the discharge was going on, of course, do you?

[fol. 61] A. I don't know whether they placed it there temporarily or otherwise.

Q. You won't go so far as to say that it had been stowed on top of the hatch covers on the way across—would you go as far as to say that?

A. Yes.

Q. It is your contention then that the hatches had been stowed over with cork all the time, although they were in the course of discharging the cork when you reached the ship?

A. Yes, but I was there also when they took off the canvas.

Q. How long were you waiting on the pier before you went on?

A. I waited some time.

Q. Well, tell us how long?

A. When I got on the pier I saw the cargo——

Q. Tell us how long you were waiting there from the time——

A. It may be four or may be five hours, I didn't look at the watch.

Q. You think you were waiting on the pier four hours before you went on the ship?

A. Yes, sir.

Q. And you reached there at nine or ten o'clock?

A. Yes.

Q. And you went on the ship at three or four o'clock in the afternoon?

A. Yes.

Q. Were you all the time outside, or inside sitting down?

A. I was on the pier sitting down.

Q. The pier is a closed pier?

A. It is an old pier.

Q. Is it a closed pier?

A. It is badly broken up—I don't know what you mean by closed.

The Court: Has it got a roof over it?

The Witness: It has a shed.

[fol. 62] Q. Now. when you were standing, you were standing during those four hours on the shed?

A. On the pier.

Q. Were you in the shed or outside of it?

A. In the shed.

Q. And you were never outside of the shed, were you?

A. I was out for lunch, during the lunch hour.

Q. I mean from the time you went on to the pier to the time you left the pier, except for luncheon, you were not outside the shed?

A. No.

Q. Whereabouts on the pier was the steamer located, on which side of the pier?

A. On the uptown side.

Q. The north side?

A. Yes, the north side.

Q. Was she bow in or bow out?

A. I didn't examine the bow.

Q. What?

A. I didn't examine the bow of the ship, I wasn't interested in the ship, whether she was standing one way or the other.

Q. How long is the pier?

A. Two sections the pier has, there is a front section and a rear section.

Q. How long is it?

A. A pretty long pier, I didn't measure it.

Q. A thousand feet?

A. I don't think so; possibly 300 feet.

Q. 300 feet?

A. I don't know, I say possibly 300 feet.

Q. It was one of the new piers that the City built?

A. No, it was a very old pier, and the floors and every side was broken in.

Q. You weren't pleased with the pier?

A. You asked me if it was old or new, and it was very old.

[fol. 63] Q. And it was 300 feet long; so the steamer occupied the whole length of the pier.

A. No, the steamer was only on the first section.

Q. So the steamer occupied about one-half the length of the pier?

A. I couldn't tell you.

Q. She occupied only one section?

A. It looked to me as if she occupied part of the first section.

Q. So the other section was not occupied?

A. Unless it was occupied by some other steamer, I don't know.

Q. You think there were two steamers lying there?

A. I don't know, I wasn't interested in any other steamer.

Q. How long did this steamer appear to be that carried the onions?

A. I have no idea.

Q. Was it half as long as the pier?

A. I couldn't tell you whether it was half or three-quarters.

Q. You say she occupied one-half the section, and there were two sections—that would make the steamer half of 255?

A. I don't say she occupied the full section, but she was on the first part of the section.

Q. What is your best judgment of the length of the steamer? You say you were on her?

A. I don't know what her length or breadth or depth was.

Q. If she was less than half the length of the pier she would have to be less than 750 feet long, wouldn't she?

A. I can't tell you.

Q. You don't know much about the steamer, but you state you saw a great deal of the stowage of the steamer, and all that?

A. I just tell you what I saw.

Q. You saw the steamer, can't you tell us the size of it?

[fol. 64] A. I am sorry, I didn't take more notice.

Q. But you were standing there for over four hours beside the ship?

A. Yes, sir.

Q. Are you really sure that you were on the steamer at all that afternoon after they got the cargo discharged?

A. I was on the steamer.

Q. Are you sure of that?

A. Yes, sir.

Q. Is it a practice of yours to go on steamers that come into this port?

A. Why certainly, I go on many steamers.

Q. Did anybody invite you to go on?

A. I take that much privilege, I have a cargo of so many packages, the Steamship Company never stop me.

Q. You take that privilege?

A. Yes, I do go.

Q. And you went over there confessedly to see whether you couldn't prove some damage against the steamer?

A. No, I went there because I owned the cargo.

Q. But you couldn't get your cargo any sooner by going on the steamer?

A. It was my privilege to be there and see what is what; I was anxious to see the onions.

Q. It was for the purpose of seeing if you could prove any damage?

A. To see the onions.

Q. To see whether they were stowed properly?

A. To see the cargo in general, the onion cargo.

Q. You would have seen it on the pier shortly; why did you want to see it on the steamer?

A. I have been doing it on every steamer.

Q. Why do you do it; you say you didn't have any invitation to go on, you took the privilege?

A. To see that everything is in order, to see whether there [fol. 65] is any damage there, and how soon they will come out, and how soon I may expect to see them.

Q. Do you go on to see whether it is stowed properly?

A. For every purpose.

Q. To see whether it was stowed properly in the hatch?

A. Yes, as well as to see how soon the cargo will come out.

Q. Of course, when they opened the hatches you couldn't see all the way back into the after part of a hold, could you?

A. No, I couldn't see anything but cargo there, general cargo on top.

Q. I say you couldn't see the after part of the hold, all you could see was the well of a hatch when they opened the hatches?

A. Just the size of the hatch.

Q. All you could see was the well of the hatch, and the cargo was stowed right up in it?

A. Yes.

Q. And it was there that you saw what you described as raisins and nuts?

A. Dried fruit.

Q. You couldn't see in, you could only see the well of the hatch?

A. Yes, that is all.

Q. Now in what holds did you see even that, the well of the hatch, what holds were they, do you remember?

A. The holds in each hatch; there was I believe five, there was 1 and 2 front, and 3 rear.

Q. You looked down in the hatches 1, 2 and 3?

A. I looked in hatch 4—whatever hatches there were there I went from hatch to hatch.

Q. You mean to say that you looked down into each of the hatches of the steamer?

A. Yes, sir.

Q. Were you present at each one when the tarpaulins were taken off?

[fol. 66] A. I wasn't present at each one when they were taken off, I saw them taken off.

Q. You couldn't see them all taken off surely when you were standing at one hatch?

A. Surely you could see them.

Q. How could you see through the bridge?

A. When you stand on the pier, on the floor, you can see what is going on on the deck of the ship, the ship was a low ship, it wasn't one of those very high ships.

Q. You don't mean to say that your eyes when you stand on the pier are level with the top of the ship?

A. With that ship it was, I could see everything that was going on on top of the hatches.

Q. So you didn't look up when you were standing there?

A. I looked up as every human being would do.

By the Court:

Q. He is inquiring whether you looked up when you saw these hatch covers taken off; were they level with your eye or how did you look?

A. Just as I stood on the pier, I looked straight up, I saw everything going on.

By Mr. Loomis:

Q. You looked straight up?

A. I looked over the ship.

Q. You said you looked up, straight up, and now you say you looked over the top of the ship.

A. I don't know what you want.

By the Court:

Q. He wants to know in what direction you looked as you stood on your feet on the pier, up, down, or straight [fol. 67] ahead, or straight up?

A. Well, over the ship.

Q. Well, how far above your head was the rail of the ship?

A. I don't think it was—I doubt if it was 20 inches.

Q. The top of the rail?

A. That was the edge of the ship?

Q. Well, whatever was between you and the men on the deck.

A. I don't think there was any rail on that steamer the way the cargo was stowed, there wasn't any rail.

Q. And the edge of the deck you think was 22 ft. above your head?

A. About 20 inches.

By Mr. Loomis:

Q. The edge of the ship was 20 inches above the top of your head?

A. But if you stood from a distance it was very simple to see what is going on always, a little away from the steamer.

By the Court:

Q. You stood how far away?

A. Six or seven feet away from the side of the pier.

By Mr. Loomis:

Q. How could you, you know the shed comes out to the edge of the pier; how could you stand six feet away when the shed itself extends right out?

A. The same way as they unload the cargo, the shed is there as well, and still they unload the cargo, so it gives plenty of space.

Q. Now, it appears you were standing inside of the shed looking out through a door?

A. Yes.

Q. All right. Well, how could you see anything but the hatch visible through that door; how could you look out and see the other parts of the ship?

A. I made it my business to see.

[fol. 68] Q. As you were standing there, six feet from the edge of the pier, looking through a door, you could see only the hatch immediately in front of you; you couldn't look through the walls of the shed and see the hatches forward and aft?

A. There are a number of open places on the pier.

Q. But there are doors: it isn't one continuous opening?

A. There they are very wide doors, I am sure you know the size of those doors as well as I do.

Q. How wide are they, as you think?

A. Oh, I judge 15 or 20 ft.

Q. And how much is the distance of the wall, the part of the shed, between each door?

A. Possibly 10 ft. or so.

Q. So when you stood back inside on the shed looking out at the hatch in front of you you couldn't see the other hatches on the steamer, could you?

A. I could very well see every hatch, for I could go from one door to the other and look at it.

(Adjourned until 10.30 A. M., Nov. 22, 1928.)

91-109. Before: Hon. Thomas D. Thacher, D. J.

November 22, 1928, 10:30 a. m.

Same Appearances.

S. S. Vallescura.

HARRY SCHNELL, resumes the stand for further examination by Mr. Loomis:

Q. I was cross-examining you last night when you left the stand in respect to the amount of the deck of the ship [fol. 69] Vallescura you could see while standing on the pier, and my recollection is, that you thought you could see the whole of the ship from where you stood.

A. The whole of the ship? No. I was on board of the steamer.

Q. You afterwards went on board?

A. Yes, sir.

Q. You could not see the various hatches from where you stood on the deck of the pier?

A. I saw the tarpaulin being taken from those hatches.

Q. Could you see the hatches themselves from the deck of the pier?

A. When I went on board the steamer, that was the place.

Q. You are not answering my question.

A. Probably it must have been low tide. I saw the tarpaulin being taken off from the hatches.

Q. You have not answered my question yet.

A. Please repeat it.

Q. Could you see the hatches themselves as you stood on the deck?

A. I saw the place, that is, I saw where they took out the tarpaulin from the hatches; I saw the hatches, sure.

Q. Could you see from where you stood, the hatches themselves?

A. I mean, the hatch coamings, you don't mean the inside, do you? The outside, yes.

Q. The hatch coaming?

A. The frame, yes, where the hatches are, that's what I saw.

Q. As you stood on the deck of the pier?

A. Yes.

Q. You saw that after the cloth had been taken off?

A. I saw that when they took off the tarpaulin.

Q. You could not see it while the cloth was still on there, could you?

A. No.

Q. So that the time when you first saw the hatches as you stood on the deck of the pier, was after the cloth had been [fol. 70] removed from the deck of the ship?

A. You mean, when I was standing on the pier?

Q. Yes.

A. After the cloth was removed, then the laborers, the longshoremen, were taking those tarpaulins from the hatches.

Q. And it was then that you went on board?

A. That was the second time I went on board.

Q. You had been on board previously?

A. Yes.

Q. When were you on board previously, first?

A. When I got on the pier.

Q. You went on board when you got on the pier?

A. Yes, sure.

Q. But then the cloth was still on?

A. Yes.

Q. And the hatches were still covered?

A. Yes, sir.

Q. And then it was that you saw, I suppose, each of those hatch openings, not only closed with tarpaulins, but actually covered with cargo stowed on top?

A. Yes, sir.

Q. There is no doubt about that in your mind?

A. Not at all.

Q. Do you claim to be an expert on onion deterioration, or are you just an expert in the buying and selling of onions?

A. I have handled onions for about fifteen or sixteen years.

Q. You are not answering my question.

A. I do know a good deal about my onions through my experience in handling onions year in and year out.

Q. Do you claim to be anything more than an expert in the buying and selling of onions?

A. I claim to know the onion business as far as the keeping qualities and condition of onions as good as any man in the line of the onion business.

[fol. 71] Q. I do not doubt that you know the business as well as any man. Do you claim to be an expert on the theory of onion deterioration?

A. As to quality and conditions?

Q. No.

A. Keeping quality?

Q. As to onion deterioration. As to what causes deterioration of onions.

A. Yes.

Q. What is it that causes deterioration? It is germs that come into the onion, or germs that are already within the onion, or what is it that causes the deterioration?

A. Lack of ventilation, poor storage and excess of moisture while the onions are in the field, or excessive heat.

Q. I know all those things. We do not need an expert to tell us that. Do those external physical conditions of themselves produce the damage, or do they set in operation germs and bacteria that are within the onions already, or get into the onions from the outside and incubate them and thereby cause deterioration?

A. If any onion that is defective by any disease when she is growing, during the time they pick those onions they can tell the difference between bad ones and good ones.

Q. What causes disease in onions?

A. Excessive moisture.

Q. You are getting the physical condition.

Q. There is some bacteria, a little animal organism that causes it?

A. In onions, as far as onions go, there may be some, but I have not seen any yet. I have not seen that yet.

Q. You do not know anything about bacteria?

A. Not as far as onions, because I have had many onions, and I have never found diseased onions.

Q. You do not think you could see the bacteria?

[fol. 72] A. If the onions decay, I presume I could see it.

Q. I am talking about bacteria that would cause the disease.

A. The onion disease of that nature would be in the heart of the onion not in the surface of the onion.

Q. You are arguing. Could you see the bacteria themselves that produced the decay in onions?

A. The onions has to be cut open to see it.

Q. Could you see the bacteria if you cut the onion open?

A. Yes.

Q. How big are they?

A. Not very big.

Q. Big enough to see with the naked eye?

A. A black spot would show inside in the heart of the onion.

Q. Are they big enough to be seen with the naked eye?

A. Some more and some less.

Q. Could you see them crawling around?

A. No, you could not see them crawling around.

Q. Do you claim to be an expert on the bacteria that produces decay in onions? Can you tell me how many different kinds there are?

A. No, I am sorry, I cannot.

Q. You do not know anything about these bacteria, or their classification, or how many there are?

A. No.

Q. That is all.

Redirect examination.

By Mr. Joffe:

Q. From your experience of fifteen years, could you tell whether the onion was a diseased onion or a healthy onion?

A. Yes, by cutting it open.

Q. Could you tell it by looking at the onion and handling it, without opening the onion?

A. I would, if it is very badly diseased I would.

[fol. 73] Q. Can you tell the court where the onion is attacked when it is a diseased onion?

Mr. Loomis: I object to that question, unless the witness is prepared to say that there is only one way.

Q. Can you tell the court where the onion is attacked when it is a diseased onion? What portion of the onion?

Mr. Loomis: I object.

Objection overruled.

A. Always where the stump of the onion is, in most cases, that is.

Mr. Loomis: I also object on the ground that he says he knows nothing about bacteria.

The Court: There may not be any bacteria. That is an assumption of your own. He says he knows what a rotten onion is.

Q. Were the onions that you saw on the "Vallescura" that you examined, diseased onions?

A. No, sir.

Q. Were they healthy onions?

A. They were very healthy onions as far as being free from any disease.

Q. I show you an onion and I ask you if that is the usual type of Spanish onion?

A. Yes, sir.

Q. Is the onion I am exhibiting to you, a healthy onion?

A. Yes, sir.

Q. Will you indicate to the court, please where the first evidence of any disease that is known in the United States [fol. 74] which attacks onions is indicated immediately as it attacks the onion?

A. On this side of the onion it would be soft and watery, showing that it has defects, it does not dry out, mature properly.

Q. And if you were to push your finger at that particular point, what would happen if the onion was diseased?

A. There would be an empty space here and it would show so much dampness, not matured properly.

Q. Will it show any discoloration?

A. If it is diseased?

Q. Yes, surely.

Q. In what form?

A. A bad color; but not the natural color.

Q. Can you tell the court, from your experience, how the onion looks if it was confined to a place without ventilation or excessive heat, for a period of say from two to three weeks?

A. It should show slime, if lack of ventilation, excess of heat, it would be slimy.

Q. Where?

A. Under this first shell.

Q. And the longer it was in such a confinement, will the slime go beyond the first layer of the onion?

A. It would go as far as the third tier, one, two, three tiers.

Q. And if left there for a very long time, then would it consume the entire onion?

A. It would go gradually. It would take a longer time to go through the entire onion.

Q. And the deterioration of which you speak, would take longer under those conditions, going outside to inside?

A. Yes, sir.

Q. And deterioration caused in a diseased onion, will go from inside to the outside?

[fol. 75] A. Yes, sir, it will show right here at the end of the onion.

Q. Will you please cut this onion open?

A. Which way?

Q. Cut this one open one way and we will cut another one open the other way. (Witness cuts the onion.)

Q. Now, will you please cut the onion long ways?

A. (Witness cuts another onion.)

Q. Now, are these two onions that you opened for the court, known as an absolutely perfect onion?

A. Yes, sir.

Q. How long is it since it came from Spain?

A. From the steamer Levanza, which was here about six weeks ago.

Q. Did it have any special care?

A. No, as far as in my possession, none whatever.

Q. And it came in the ordinary way on the steamer?

A. We left it on the floor with ventilation.

Mr. Loomis: I object.

The Court: He got it in the course of business.

Q. Now, Mr. Schnell, after you saw the condition of the onions on the day you were on the pier, on the S. S. Vallescura, did you go over to the Lord Marine Corporation?

A. When I came to my office I called them up and I asked for the parties who had charge of the Vallescura, and I told them the condition of the onions, and told them that I intended to hold them responsible. I also further complained to them that on the fifth of December, I wrote a letter to the agent telling him that the cold weather at the [fol. 76] time of the year may be expected any minute and he should be kind enough and place that steamer on a pier where it would be well protected in cold weather. He has acknowledged that letter to me and promised that he would do so.

Mr. Joffe: I ask you to produce, Mr. Loomis, our letter to you of December fifth, which was answered by your letter to us of December seventh. I offer both letters in evidence as one exhibit.

Mr. Loomis: I have no objection.

(Received and marked Libellant's Exhibit 11.)

Q. Did you go to see the Mutual Lord Marine Corporation?

A. Yes, I have been in his office. That was a day or two later.

Q. Did you speak to any person there?

A. I spoke to the agent, and I told him how bad the cargo was and that I intended to hold them responsible, and I also referred to his letter that he would take proper care from freezing, but it seems that he has not carried out what he promises. He placed the steamer on one of the poorest piers available.

Mr. Loomis: I move to strike that out, "it seems".
The Court: No, that is what he told him.

Q. Did you after that visit send a registered letter to the Mutual Corporation?
A. Yes, sir.

Mr. Joffe: I call for the letter of December 12, 1925, Mr. Loomis.

[fol. 77] Q. I show you this letter and I ask you whether that is the letter?
A. Yes, sir; this is the letter.

Mr. Joffe: I offer it in evidence.

(Received and marked Libellant's Exhibit 12.)

Mr. Loomis: No objection.

Q. Mr. Schnell, did you repack all of your onions on the pier?
A. No, just a portion of the cargo.
Q. What portion of the cargo, if you remember?
A. Repacked probably seven to eight thousand packages.
Q. And what did you do with the balance of the cargo?
A. The balance of the cargo was removed by lighters to a store house.
Q. Do you remember the name of the store house?
A. I think it is the Standard Milling Corporation.
Q. Where is that store house?
A. Somewhere in Jersey City.
Q. Do you remember how many packages you sent there?
A. To be accurate, you will have to let me see the record.
Q. I will show you the record and see if that refreshes your recollection as to the number of packages that were removed to the warehouse.
A. Yes, this is the quantity that we removed to the store house.
Q. How many?
A. About fifteen thousand.
Q. Now, Mr. Schnell, are there records in the State of New Jersey by the Board of Health of any cargo——

[fol. 78] The Court: I am not going into the details of damage. You have already shown that there was some damage.

Q. There was something said about the last cargo coming into the Port of New York around December. Will you tell the Court what is the end of the shipping season with reference to the Spanish onions, and how late cargoes of Spanish onions are usually received in the port of New York.

A. They are usually received up to the end of March. We bring in onions during April and May from Spain.

Q. How late did you bring in onions during the season of 1925-26, from December, running into 1926?

A. Until the end of March.

By Mr. Loomis:

Q. You say there are fifteen thousand crates of onions that you had taken on lighters over to a warehouse in New Jersey?

A. Yes, sir.

Q. There were three thousand odd cases that were condemned by the Board of Health, were there not?

A. Out of the part that they had repacked on the pier, there were about three thousand left.

Q. What became of the difference between the fifteen thousand that you had in the New Jersey warehouse, and the three thousand that were condemned by the Board of Health?

A. We shipped some of the repacked ones to our trade and we also shipped some originally to our trade.

Q. And the onions that you shipped to the trade were not sent to the warehouse in New Jersey?

A. No, these were repacked and shipped out of town.

[fol. 79] Q. And the onions so shipped to the trade accounted for the difference between those condemned by the Board of Health and those which were taken to the warehouse in New Jersey?

A. Yes.

Q. Were those taken to the warehouse in Jersey sound, healthy onions?

A. They were the same cargo that came out in the original condition.

Q. Were they in the original condition?

A. They were in the original condition, the same as those that were repacked, the same lot that we repacked.

Q. Were they in good condition, those you took to the warehouse in New Jersey?

A. No, those were in poor condition.

Q. Were those you shipped to the trade in good condition?

A. Those we repacked were sound.

Q. How about those that you shipped to the trade?

The Court: He said that he repacked them and made them good.

Q. There would be a difference of about eight thousand crates between the fifteen thousand shipped to New Jersey and the three thousand condemned by the Board of Health?

A. Whatever the difference is we shipped. We took a few in to our store by trucks from the ship.

Q. I want to know whether those eight thousand cases which you shipped to the trade were in good condition?

A. Repacked. We repacked them and shipped them.

Q. They were in good condition?

A. After they were repacked they were sound, surely.

[fol. 80] Q. Well, now, let me see. I want to get this straight. You say there were fifteen thousand taken to New Jersey?

A. The receipts are there.

Q. Is that what you said a moment ago?

A. About fifteen thousand packages.

Q. That would leave eleven thousand approximately?

A. We sent a few to the store, maybe a thousand or eight hundred, I don't know exactly unless I refer to the records.

Q. Take that eleven thousand that I spoke about.

A. Yes.

Q. When you separated them and divided them and repacked them,—you repacked them?

A. I repacked those on the ship, some, but some I believe I shipped originally, I believe twelve hundred I shipped originally.

Q. Without repacking at all?

A. Without repacking at all.

Q. Were they in good condition?

A. No, the party to sell them for my account at the best possible price. They were not repacked.

Q. Did you tell the buyer that they were in bad condition?

A. Why, surely, I told them that they were to be sold for my account.

Q. So, those that you did not repack at all, did you send them to somebody to be sold for your account?

A. J. A. Blumgarten, Detroit, Michigan.

Q. That would leave approximately ten thousand odd crates out of the eleven thousand lot?

A. Yes.

Q. Did you repack all of those ten thousand?

A. I repacked those with the exception of those I took to the store. Those I did not repack.

Q. How many were there of those?

A. About a thousand. I can tell you by the records.

[fol. 81] Q. So that that would leave about nine thousand of the eleven thousand lot?

A. Around that.

Q. Did you repack all of the nine thousand?

A. Yes.

Q. After you had repacked them, they made three thousand cases of bad onions, didn't they, and left six thousand cases of good onions?

A. About those figures, yes.

Q. In other words, the damage was about one-third of that nine thousand lot?

A. Yes, about one-third, yes.

Examination of witness closed.

Mr. Joffe: Mr. Levy was very much perturbed about one question he was asked, and I want to relieve him of some worry.

Morris Levy, recalled.

Direct examination.

By Mr. Joffe:

Q. Mr. Levy, tell the court, please, whether you called me up this morning?

A. Yes, sir; I telephoned to your office this morning.

Q. Did you have a conversation with me?

A. Yes, sir.

Q. And you told me you had found certain records in your office?

A. Yes, sir.

Q. Have you produced those records?

A. I have them on my person.

Q. Will you let us have them?

A. Yes, sir.

Q. What are those records?

A. It is a memorandum record that I keep, or that I use, [fol. 82] when I go to piers to make examination of cargoes, and from that I transcribe it into an official document.

Q. The book you hold now is kept particularly for this particular cargo, or does it include other cargoes from day to day?

A. It includes, I should say, about forty other examinations.

Q. Will you please look as to the date of your examinations of the "Vallescura" and tell us whether you have anything there to show the number of packages that were repacked on the pier, and the number of packages that were shipped to the warehouse?

A. Yes, sir.

Q. And tell us what they were.

A. I have a notation here with reference to this particular lot of onions.

Q. On what page of your book?

A. Page forty-seven.

Q. What does it say?

Mr. Loomis: Is this a book in the custody of the Customhouse Department of the United States?

The Witness: No, sir; it is a Treasury Department book that is given to us to use in making the reports, from which they are transcribed into their books.

The Court: Is it taken from the files of the Custom House?

The Witness: It is taken from my file. I have it in my locker in the Custom House.

Mr. Loomis: Where are the original memoranda from which that book is made up?

[fol. 83] The Witness: I had it here yesterday and took it back to the Custom House.

The Court: What you took back was the dock book.

The Witness: Yes, sir.

The Court: He asked you, was there any original memorandum that you made before you made these entries.
The Witness: Was this after the original memorandum?
The Court: Yes.
The Witness: Yes, sir.

By Mr. Loomis:

Q. I thought you just told counsel for the libellant in your direct examination that the book was made up from notes that you had made?

The Court: These are the notes.

A. This is a book we use on the pier, and the official record is transcribed from that.

Mr. Loomis: That was made on the pier?
The Witness: Yes, sir. The only record from this book, transcribed, is the record that refers to the result of the repacking, but the notation I have here regarding the disposition of the other crates of onions when he asked me yesterday how I could reconcile it.

By Mr. Joffe:

Q. What does it show? How many packages were repacked on the pier and how many were shipped to the warehouse?

A. 1407 packages were repacked on the pier for customs purposes.

[fol. 84] Q. How many were shipped to the warehouses, if you know, from your record?

A. 14,891 crates.

Cross-examination.

By Mr. Loomis:

Q. Did you count them yourself?
A. I didn't count them, no.
Q. Somebody gave you those figures?
A. These records were obtained from the inspectors, or the delivery officers.
Q. Somebody gave you those figures?
A. Yes, those figures were given to me.

Mr. Loomis: I object to that testimony and ask that it be stricken from the record.

The Court: It will stand subject to your objection.

JOSEPH M. GIL, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By Mr. Joffe:

Q. Mr. Gil, where do you reside?

A. 1018 Summit Avenue, New York City.

Q. And you are a native of Spain?

A. Yes, sir.

Q. What business are you in?

A. I am representing in this country a group of growers and shippers of Spanish onions.

Q. How long have you been interested in the Spanish onion business as importer of Spanish onions?

[fol. 85] A. Fourteen years in this country and four years in Great Britain.

Q. And during all that time you were a representative of the importers of Spanish onions?

A. Yes, sir.

Q. And prior to going to Great Britain, were you interested in growing Spanish onions in Spain?

A. Well, I was born there, right as you would say, among the onion fields.

Q. Were you in Spain during the year 1925?

A. I was.

Q. During what months?

A. I was in Spain since May till November.

Q. Did you know of the cargo of Spanish onions that came on the S. S. Vallescura from Spain to New York?

A. Yes.

Q. Where did you see that cargo in the first instance? Tell us about the date and the place where you saw it?

A. I saw part of that cargo in Granada and part in Denia.

Q. Where?

A. The first time I saw the cargo was in the packing house before the onions were being packed.

Q. In crates and half cases?

A. Before they were placed in crates. That was the first time I saw the onions.

Q. Did you examine the onions?

A. I did.

Q. Please describe to the court the condition of the onions you saw at that time.

The Court: What relation did he have to this business?

Q. What interest did you have in the seeing of the onions?

A. As part of my business. I was in Spain visiting my principals and it was my business to go to different packing houses.

[fol. 86] Q. And it was your business to examine the cargoes that were leaving Spain for New York?

A. Yes, sir. I made it my business.

The Court: To examine all the onions you saw in Spain?

The Witness: Not all.

The Court: What relation did you have to this shipment?

The Witness: I had no relations whatsoever with this.

Mr. Joffe: He does not understand the word, "relation".

The Court: He seems to be a very intelligent man. He said he had no relations with this cargo whatsoever.

Q. Do you sell onions to Mr. Schnell?

A. I do.

Q. And you sell them every year?

A. Yes, sir.

Q. What interest did you have in examining these onions in Spain? Please tell us.

Mr. Loomis: I object.

The Court: He may answer.

A. Well, Mr. Mentone told me he had an order for Mr. Schnell and while I was in the agent's office of the steamship company, Mr. Mentone said, "Would you like to come to the packing house"? I said I wouldn't mind, so knowing that these onions were Mr. Schnell's, I examined very carefully the onions Mr. Mentone had in his packing house.

Q. How many onions do you sell a year to Mr. Schnell?

[fol. 87] A. About three hundred thousand packages a year.

Q. Year in and year out?
A. Yes, sir.
Q. Will you now tell us what you saw? Describe the condition of the onions as you saw them in the packing house in Denia.

The Court: Did you have any relations with Mr. Mentone?
The Witness: He was a friend of mine.
The Court: You had no interest in this shipment in a business way?
The Witness: No, I was not financially interested in them.

Q. Tell us what you saw.
A. The onions I saw there in the packing house were being selected, different sizes, fifties in one pile, seventy-twos in another pile.

The Court: What are those?
The Witness: These crates come in three different sizes, and the girls select them in different sizes, grade them, bigger onions to smaller and still smaller onions.

A. (Continued.) And while they were doing this selecting, I looked at some of these onions, and they were very, very sound and a bright kind of onion.
Q. Was it a healthy onion?
A. Very healthy.
Q. Had it any evidence of any disease?
A. Not from where these onions came from.
Q. Are you acquainted with the diseases of onions?
A. In some respects, yes.
[fol. 88] Q. Have you seen them on the fields before they are gathered?
A. Yes, sir.
Q. Did you see these onions before they were placed on the steamer?
A. Yes.
Q. Where?
A. I saw them after being packed, I saw them in the packing house and then I saw them on the pier.
Q. Were the onions marked by a special mark?
A. Yes, they had "Mentone, Benjamin Bryan and Joseph Dronin."
Q. Did you see the onions leave the field for the steamer?

A. I saw some in Granada.

Q. How were they delivered to the steamer?

A. Small carts.

Q. From the dock to the steamer?

A. Stevedores or longshoremen take one crate and put it inside a lighter, one by one.

Q. They delivered to the steamer by lighters?

A. Yes, sir.

Q. And you could see the steamer from the port?

A. Yes, it is only two miles outside in the stream.

Q. What was the condition of the onions when you saw them before they were placed on the lighters to go to the steamer?

A. They were very good.

Q. Were they in the same condition as you saw them in the packing house?

A. Yes, sir.

Q. Except that they were crated?

A. Yes, sir.

Q. The court asked you what you meant by assorting them. Will you please explain in what designations and quantities onions come in crates? What is meant by seventy-twos, and what is meant by fifties?

[fol. 89] A. There are three different sizes of crates; one crate contains seventy-two onions, which is that crate there, that is the medium size. Then comes a bigger size, which contains fifty onions to the crate. And then comes a bigger onion that contains thirty-two onions, which is a very large onion.

Q. When you say, bigger sized crates, you mean that there were fewer onions to the crate, but that the crate is about the same?

A. Yes, sir.

Q. That is the difference? It is only the size of the onion that differs?

A. Yes, sir.

Q. The weight of the onions is about the same?

A. That is correct.

Q. When did you leave Spain?

A. The fifth of November.

Q. On what steamer?

A. I left from Cherbourg on the Berengaria.

Q. When did you arrive in the port of New York?

A. I believe it was the thirteenth or fourteenth of November.

Q. Did you go to the pier with Mr. Schnell, Pier 3, at Stapleton, to see the cargo of the Vallescura?

A. I did.

Q. Did you see it?

A. Yes, sir.

Q. Were you on the steamer?

A. No.

Q. Where did you see it?

A. I saw it on the pier.

Q. Will you please tell the court the condition of the onions as you saw them on the pier, that came out of the steamer Vallescura? I am referring now to the same onions by the same marks, for Mr. Schnell?

A. Well, I couldn't believe my own eyes when I saw those onions?

The Court: Strike out the answer.

[fol. 90] Q. Please answer the question. Tell the court the condition of the onions as you saw them on the pier, that came out of the steamer Vallescura.

A. They were in a terrible condition.

Mr. Loomis: I object.

A. The condition of the onions I saw, they were heated and as known to the trade, baked onions.

Q. Please describe exactly, in as simple language as you can.

Mr. Loomis: May I ask to have the last answer stricken out.

The Court: It may stand for what it is worth.

A. They were slimy and just like slimy, soft, the first and second layers of skins were just like as though they had been baked.

Q. Did you handle the onions?

A. I did.

Q. Did you open them?

A. I did.

Q. Were they hard in the heart of the onion, firm?

A. When I cut them, they were exactly as I saw them in Spain, sound and healthy.

Q. And on the outside, the first two layers of the onion were slimy?

A. Yes, the tissues were all burned.

Q. You spoke of the onion being baked. Is that a trade description of a certain type of onion?

Mr. Loomis: I object.

The Court: The description is all that I will pay attention to.

[fol. 91] Q. Mr. Gil, from your experience, and from being interested in the Spanish onion business for the last eighteen or twenty years, can you tell whether the onions which you saw in Denia and Granada in Spain were diseased onions?

A. No.

Q. From your experience, were they in condition for shipment to the Port of New York?

A. Yes, excellent condition.

Q. From your experience as a person interested in the business for the last eighteen years, would you say on your examination in the port of New York that the onions that arrived on the S. S. Vallescura were diseased onions?

A. No, they were not diseased.

Q. Are you in a position to tell us what was the approximate cause of the damage to those onions, from your examination?

Mr. Loomis: I object.

Objection sustained.

Q. Can you tell us from your examinations, from your examination of the onions, what was the cause of that condition?

Mr. Loomis: Same objection.

Objection sustained.

The Court: I shall require you to state a hypothetical question first, and then ask whether he can answer it with reasonable certainty.

Q. Mr. Gil, will you please take into consideration your examination of the onions in Denia and Valencia, the condi-
[fol. 92] tion in which they were packed as you saw them, the examination of the onions in New York as they came out of the steamer Vallescura; can you tell us with reasonable certainty from your experience as a person dealing in

onions for the last eighteen years, as to the reasonable cause of that condition of the onion when it arrived in the Port of New York?

Mr. Loomis: I object to that.

Objection sustained.

The Court: Assuming that these onions were received on board that steamer in the condition in which you saw them, and were received in New York from the steamer in the condition in which you saw them on the dock, can you, in the light of your experience, state with reasonable certainty whether the difference which you noted in their condition, was due to any cause arising before they were put on board the steamer. Can you answer that question with reasonable certainty? Answer it, yes or no.

The Witness: In my opinion——

The Court: No. Answer it, yes or no. Can you answer it with reasonable certainty?

The Witness: Yes.

The Court: It is not a mere guess?

The Witness: No. I can answer that.

The Court: In other words, this question is put to you for an answer upon which this court would be justified in [fol. 93] relying upon a well-founded opinion. Can you answer the question in that sense?

The Witness: Yes, I can.

Q. Mr. Gil, will you please take into consideration your examination of the onions in Denia and Valencia, the condition in which they were packed as you saw them, the examination of the onions in New York as they came out of the steamer Vallescura; can you tell us with reasonable certainty from your experience as a person dealing in onions for the last eighteen years, as to the reasonable cause of that condition of the onion when it arrived in the Port of New York?

A. These onions were damaged——

The Court: No. I have not asked you to state how they were damaged. I am asking you to state whether or not they could have been damaged by any cause arising before they were put on board the vessel.

The Witness: No.

Q. Can you tell us what, in your opinion, was the cause of the condition as you saw them in the Port of New York?

Mr. Loomis: I object.

Objection sustained. Exception.

Mr. Joffe: Unless your Honor does not want me to go beyond this, I want to go a little further than your Honor's question.

The Court: I do not see how you can form the basis of [fol. 94] any such question, because you are asking him to exclude things that we do not know anything about. You want to ask him to say what caused it. It may have been caused by a hundred different things on board the ship.

Mr. Joffe: No, I do not ask him what happened on board of the ship, but what caused it.

The Court: Exactly. He said it was caused by nothing before it got on board the vessel. Now you want to go further and ask him what caused it. He cannot say that.

Mr. Joffe: A doctor examining the limb of a person can tell whether it was caused by a blow, or a cut, or some foreign matter coming into contact. So these people constantly dealing in onions can state the conditions.

The Court: You may limit your question, but the way you are putting it is absurd. How can he say what caused it?

Q. Can you tell us what caused that condition that you found the onions to be in on examination of the cargo at the Port of New York? Yes or no.

Mr. Loomis: I object.

Objection sustained.

Exception.

Cross-examination.

By Mr. Loomis:

Q. Mr. Gil, did you make an examination at both of those ports at which the onions were loaded, Denia and Granada?

A. I saw them being loaded in Granada.

[fol. 95] Q. Did you also see them being loaded in Denia?

A. No.

Q. How far out in the stream was the steamer anchored when you saw the lighters proceeding towards her with the onions?

A. A couple of miles.

Q. Do you know anything about the effect had upon onions by bacteria?

A. I do not.

Q. You are not an expert in connection with the effect of bacteria upon onions?

A. My knowledge of onions is all practical. I never made any studies in universities, as far as bacteria or any other disease.

Q. Therefore, you know nothing about that?

A. I know something about the diseases.

Q. You know nothing about bacteria and their effect upon onions?

A. I do not know the effect of bacteria.

Q. While you had no financial interest in these onions, why was it, then, that you not only examined them over there, but when you came back to New York, you made it your business to go down to Staten Island and look at them on the pier?

A. Because I told Mr. Schnell that his lot of onions on the Vallescura were very——

Q. I don't want that.

A. Why did I go?

Q. I want to know why.

The Court: You opened a very wide gate with that, "why." Why did you go down to the pier when you did not have any interest in it?

A. When I arrived from Spain on the thirteenth or the fourteenth of November, I informed Mr. Schnell that his [fol. 96] lot of onions that went on the steamer on the Vallescura were exceptionally fine, that he had a very fine cargo of onions afloat.

Mr. Loomis: I ask that that be stricken out.

The Court: You asked him why.

A. (Continued.) And when the steamer arrived, Mr. Schnell said, "You must have been blind on these onions." I said, "They're sound like bells." "You come with me down to the pier." And we opened onions and I said, "There they are, healthy like a bell, sound." These onions had been damaged for lack of ventilation.

Mr. Loomis: I ask that that be stricken out.

A. That is my conversation with Mr. Schnell.

The Court: You may strike out everything after he said he would go down to the pier.

The Court: And so you went to the pier?
The Witness: Yes.

A. (Continued.) And Mr. Schnell.

Q. Mr. Schnell had already seen the onions prior to this conversation he had had with you?

A. When?

Q. He said he had already seen the onions on the pier?

A. He told me that the onions were no good, that they were a damaged cargo.

Q. And he said that you must have been blind when you [fol. 97] said that they were in good condition when they left the other side?

A. Yes, sir.

Q. When did you actually get on board the Berengaria?

A. I left from Cherbourg on the seventh of November.

Q. Where had you been on the sixth of November?

A. I suppose I was travelling between Spain and France.

Q. Do you know where you were on the fifth of November?

A. Still in Spain.

Q. Where?

A. Barcelona.

Q. Where were you on the fourth?

A. In Granada.

Q. You left Granada on the 4th of November?

A. Yes, sir.

(Examination of witness closed.)

GEORGE A. COSTELLO, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By Mr. Joffe:

Q. You have produced certain records pursuant to a subpoena?

A. Yes, sir.

Q. From what department?

A. Quarantine Control, the Plant Quarantine Control and Administration, Department of Agriculture.

Q. Have you those records with you?

A. Yes, sir.

Q. The department acts under the Fruit and Vegetable Quarantine, the United States Department of Agriculture?

A. Yes, sir.

[fol. 98] Q. And examinations made under the different regulations are passed by that department?

A. Yes, sir.

Q. Were these goods permitted to enter the port of New York after examination?

Mr. Loomis: Perhaps he is not qualified.

Q. Please let us have the report.

A. Yes.

Q. Did you produce entry 813138, dated the 14th of December, 1928, permit 1102, Spain, importer H. Schnell & Co., vessel Vallescura, date of arrival December 8, 1925, quantity——

Mr. Loomis: I object to this.

The Court: Strike that question all out.

The Court: Did you produce that paper from your files?

The Witness: Yes, sir.

Mr. Joffe: I offer it in evidence as a report of the United States Government, and I ask that it be read into the record so that I can return it to the witness.

Mr. Loomis: I have no objection.

(Paper marked Libellant's Exhibit 13 reads as follows):

Entry No. 813138, 12/14/25, permit No. 1102, Spain, importer H. Schnell & Co., vessel Vallescura, 3 S. I. Date of arrival, December 8/25.

Quantity of onions 25533 crates.

Kind of onions marks 83½ half cases.

Inspected and released December 15/25.

E. Kostal, Inspector of Federal Horticultural Board.

[fol. 99] Condition, twenty to twenty-five per cent. decay and sprouting.

Packing, wood cases.

Remarks. A poor cargo.

Q. Did you make an examination of this cargo?

A. I am not an inspector.

Q. You know nothing about it?

A. No, sir.

Mr. Joffe: I offer in evidence regulation six of the United States Department of Agriculture Inspection, and its notification of importation of fruits and vegetables, I ask to have it marked for identification and the convenience of the court.

(Marked for identification Libellant's Exhibit 14.)

Mr. Joffe: I also want to call the court's attention in this report to the word,—that where the word "fumigation", or "fumigated" is, there is a blank, showing, I suppose, that no fumigation was made.

Mr. Loomis: That is merely a supposition.

Q. Can you tell us if this cargo was fumigated, whether any remarks would be placed right beyond the word, "fumigated"?

Mr. Loomis: I object to that. This witness does not know that.

The Court: He could tell what the office practice was. He may examine him as to the practice in the office, filling up the cards or leaving them blank.

[fol. 100] Q. Do you know the practice in your office?

A. Yes, sir.

Q. Have you examined a number of cards like the one produced by you today?

A. Yes, sir.

Q. Is it the custom of your office to indicate whether the goods were fumigated or not?

Mr. Loomis: I object to that on the ground that it is immaterial what the custom was.

The Court: The custom may be some evidence. I will take it.

A. I might explain about the card. Those are used in making up records for cotton waste that require fumigation, and that is why we have the word, "fumigated" on there. It is for the cotton waste fumigation.

The Court: Do onions require fumigation?

The Witness: No, sir.

Q. If onions are diseased, the department refuses a permit, doesn't it?

Mr. Loomis: I object.

Mr. Joffe: It is a regulation of the department.

The Court: Does it apply specifically to the onions?

Mr. Joffe: Yes, sir; fruit and vegetables. Before you could get a permit from a United States Custom House Department, you must get a permit from them permitting the entry.

[fol. 101] The Court: You are saying, if a crate of onions has one diseased onion it it, you disinfect it?

Mr. Joffe: No. I will show your Honor the regulation.

The Court: I think you assume altogether too much. What does, "infestation", mean? I suppose that means by some carrier, as applied principally to plants.

Mr. Joffe: I offer in evidence the deposition of Mr. Mentone.

(Libellant's case closed.)

VINCENT J. MARTINEZ, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Direct examination.

By Mr. Loomis:

Q. What is your business?

A. I am secretary-treasurer of the Mutual Lloyd Marine Corporation, steamship agents and brokers.

Q. How long have you been connected with that corporation?

A. Since 1923.

Q. And you were with them in that capacity in 1925, November and December?

A. I was secretary in 1925.

Q. Describe briefly what your duties were at that time in connection with that position?

A. At that time I was chief clerk at the pier and super-
[fol. 102] intendent of discharging and loading steamers.

Q. Did those duties require you to stay at the pier for a considerable period of time?

A. They did.

Q. Do you recall in that connection the steamer, Vallescura, and the trip she made to this port where she arrived,

I believe, on or about the fifth or seventh of December, 1925?

A. She arrived on December fifth.

Q. Do you remember that independently, or do you need to refresh your recollection from the documents?

A. I remember it, but at the same time I must refresh it, but I have a very good idea that it arrived on a Saturday morning.

Q. Can you, by refreshing your recollection from your book, tell which date Saturday morning was? What was the date of the month?

A. Saturday, December 5, 1925.

Q. Where did she go immediately she came into the port?

A. She stopped at Quarantine, and they left Quarantine around ten o'clock and she was berthed around eleven o'clock on Saturday morning.

Q. Where was that berth at which she was tied up?

A. North side, Pier 3, Staten Island.

Q. Do you remember whether she was bow in or stern in?

A. She was bow in.

Q. How many sections were there to Pier 3, Staten Island?

A. They called it three sections.

Q. Into which section did the steamer go when she immediately came into her berth?

A. She came into the inner section.

Q. That is, the inshore section?

A. That is the in-shore section.

[fol. 103] Q. Was it one, two or three?

A. You might call it section number one.

Q. Did she discharge any of her cargo on Saturday, December the fifth?

A. No, sir, she did not. We rigged up the steamer for discharge.

Q. Rigged it?

A. Yes, sir, rigged it.

Q. Did that work, or did it not, consume the rest of Saturday?

A. Well, it went into about two p. m. in the afternoon.

Q. That was Saturday afternoon?

A. Yes, sir, that was Saturday afternoon.

Q. When did the discharge of the steamer actually begin?

A. The first thing Monday morning.
Q. At what time?
A. At eight o'clock.
Q. At eight o'clock?
A. At eight o'clock, yes, sir.
Q. Were you present at the pier at that time?
A. I was.
Q. What was the first thing done prior to the commencing of the discharge?
A. Well, the steamer arrived with booms up and they were just arranging around the deck there, tightening up the booms, and seeing that everything was in working order, so that no accident would happen during the discharge. And skids were put up from the pier alongside of the steamer and a few net slings were put up number one hatch and number two hatch, where the steamer was further away from the pier.
Q. That is, the middle of the steamer would be flush against the side of the pier?
A. That is right.
Q. And both ends of the steamer would be a little distance off the side, since they shaped in?
A. Yes, sir.
[fol. 104] Q. When were the hatches of the steamer first opened?
A. Number one and number two and number six hatch, they had the covers on but they were not attached to the square of the hatch.
Q. What do you mean by, covers?
A. The canvas covers, tarpaulins over the hatch.
Q. Pieces of wood? Wooden covers?
A. Wooden covers and tarpaulins.
Q. They were laid over the hatch coamings, but were not fastened?
A. Not fastened, no sir.
Q. That was at what time Monday morning?
A. That was when the steamer arrived on Saturday morning.
Q. When were her hatches first opened?
A. The hatches in fact, we might say, were opened, they were opened when she arrived, but they were covered on account of it was raining that day.
Q. You mean to say the wooden doors were taken off and the tarpaulins opened?

A. At the forward part of the square of the hatch they had the wooden doors off, about two or three boards, but the canvas covering was over the opening.

Q. And when was the canvas cover and the boards all removed first from the hatches before the discharge of the cargo?

A. The canvas covers were removed on Saturday morning and on Monday morning we took off the rest of the wooden covers off the hatch.

Q. Do you mean to say that the canvas covers were taken off after the rain ceased?

A. Yes.

Q. And before the commencement of the discharge, when were the wooden covers taken off?

A. The first thing Monday morning.

Q. You mean at eight o'clock?

A. Eight o'clock.

[fol. 105] Q. Were you on the steamer when the hatches were so uncovered?

A. I was down about seven-thirty in the morning.

Q. Were you on the steamer when the hatches were opened in that fashion?

A. I was.

Q. And did you see them so opened?

A. I did.

The Court: Were those wooden covers solid hatch covers?

The Witness: Yes, sir, hatch covers right across.

Q. Were the wooden covers solid, all one big board?

A. No, sir, two sections.

Q. Describe the wooden pieces that made up the hatch covers.

A. Well, they are about two and a half feet by six feet.

Q. You are now describing a board?

A. Yes, sir, two and a half by six.

Q. And how thick?

A. About three inches thick.

Q. And how many of those boards were there to each hatch of the steamer?

Mr. Joffe: He answered that they were in two sections.

The Court: He may answer it again. I want to know what he means by two sections.

Q. How many of such boards are there to each hatch of the steamer?

A. How many?

Q. Yes. How many of such boards are there to each hatch of the steamer?

[fol. 106] A. Well, they all vary according to the size of the square of the hatch.

The Court: Is the hatch cover a solid board structure?

The Witness: No, sir, that is all in small sections. All boards about six feet long by two and a half wide.

The Court: But solid planking?

The Witness: Yes, sir, solid planking.

Q. And there are a number of those boards?

A. Yes, there might have been twenty or twenty-five.

Q. For each hatch?

A. For each hatch.

Q. And when the hatch is covered preparatory to the ship's going to sea, those boards I suppose are closely tied together?

A. They are all tight and staunch.

Q. And then they are battened down?

A. And then they are battened down, with iron pieces running along the side. The iron pieces go in first, and the wooden pieces go on top and the three tarpaulins are battened down over that.

Q. You said that these hatch covers, consisting of boards, the tarpaulins already having been removed, the boards were taken off at eight o'clock Monday morning?

A. Yes, sir.

Q. That was the seventh of December?

A. Yes, sir.

Q. Was there anything on top of the hatches than these boards you have described?

A. No, sir.

The Court: When?

[fol. 107] Q. At what time are you speaking of?

A. When the steamer arrived.

Q. That is, Saturday, the fifth?

A. Saturday the fifth.

Q. Did you see her on that day?

A. I did see her that day.

Q. You were down at the pier that day?
A. I was down at the pier that day.
Q. Were you on her that day?
A. I was.
Q. Was there anything on top of the hatch doors on Monday morning when you went there?
A. No, sir.
Q. Did the steamer carry any deck cargo?
A. She did.
Q. What was that cargo?

The Court: I thought you said that the hatches were open when the vessel arrived.
The Witness: Number one, two and six hatch.
The Court: Were the hatch covers taken off of those?
The Witness: Yes.
The Court: I have another note that the wooden covers remained there until Monday at eight o'clock.
The Witness: Yes, sir.
The Court: Then the hatches were not opened?
The Witness: Well, when the canvas is off a hatch we consider that open.
The Court: Tell us exactly what was done from the time you first saw this ship, with reference to these hatches. You saw her on Saturday. What did they do with the hatches on Saturday?

[fol. 108] A. On Saturday I saw one, two and six hatch and the covers, the canvas covers, were partly on to the square of the hatch and the forward part of the hatch had two of the boards off the square of the hatch.

Mr. Loomis: So that there was an actual opening in the hatch, so that you could look down into the hold?

A. Yes, sir.
Q. That was one, two and six?
A. That was one, two and six.
Q. You said something about a rainfall?
A. It was raining the morning she arrived.
Q. Was it raining at the time these hatches were open in the manner you describe, or did it commence to rain afterwards?
A. I don't remember.

Q. Was it raining at any time while the hatches were open in the manner you have described?

A. I don't remember that.

The Court: You told me a moment ago that these hatch covers were solid planking, and I inferred from that, that you could not take out any individual boards.

The Witness: I think you misunderstood me. I said they were not solid planking, they were solid in the sense that each plank is a solid plank, but it is not solid all across, not all across the square of the hatch.

The Court: The cover over these hatches was composed of individual boards?

The Witness: Individual boards. I can show you a diagram of them.

[fol. 109] The Court: It was an ordinary hatch cover with individual planks?

The Witness: Yes, sir.

Q. Now, Mr. Martinez, you say that some of those boards were off of the hatches on Saturday morning?

A. They were when I saw them, yes.

Q. And as I understand it, neither at that time nor on Monday morning, when you went to the ship at eight o'clock, was there anything loaded or stowed on top of the hatches?

A. There was not. Not on one, two and six.

Q. Did the vessel carry any deck cargo?

A. She did.

Q. What was that composed of?

A. Crates of cork insulation.

Q. What is that?

A. Crates of cork insulation.

Q. By insulation, you mean cork that is used for the purpose of separating or insulating?

A. For insulating refrigerators. I don't know what other use they may have for it, but it is manufactured cork insulation.

Q. Will you describe how that was stowed on the steamer's deck?

A. That was stowed in the fore part, and the after part of her number four hatch on the port side and the starboard side of the deck.

Q. Of the number four hatch?

A. Of the number four hatch.

Q. Do you remember whether all of the cork that the steamer carried was carried on deck on that way?

A. No, sir.

Q. You don't recall that?

A. No, it was not carried on deck.

Q. It was not carried on deck?

A. It was not carried on deck.

[fol. 110] Q. Some of the cargo was stowed below the deck?

A. Yes, sir.

Q. Was any of that cork cargo that was carried on deck, stowed over any of the hatches?

A. Yes, it was.

Q. What hatch or hatches was it stowed over?

A. Over the number four hatch.

Q. Was that the only hatch it was stowed over?

A. I believe it was, yes, sir.

Q. Was there any of that cork cargo on deck that was stowed over hatches one, two or six?

A. There was not.

Q. Now, after the steamer commenced discharging Monday morning, what was the first cargo discharged from the steamer?

A. A cargo of onions.

Q. From what hatches was this cargo of onions taken out?

A. Of the number one, two and six.

Q. And where were they placed after being taken out of these hatches, one two and six?

A. They were placed in section one, of pier three.

Q. And you have already said that that was the in-shore section?

A. Yes.

Q. Do you recall about when the discharge of the onions was completed?

A. About Tuesday afternoon, five p. m.

Q. Was any other cargo besides the onions discharged from the steamer between eight o'clock on Monday morning and five o'clock on Tuesday afternoon?

A. We discharged some case goods and we discharged a few bags of almonds and peanuts, I believe.

Q. Did they come out after the onions were discharged,

or before the onions were discharged, or contemporaneously with the discharge of the onions?

[fol. 111] A. They came out contemporaneously with the discharge of the onions.

Q. And from what hatches did they come out?

A. They came out of No. 2 hatch.

Q. Number two hatch?

A. Number two hatch.

Q. Now, after the onions were discharged in the manner you have stated, and I think you said some almonds and peanuts, case goods; now, after those goods were discharged, did there still remain cargo in or on the steamer?

A. Yes.

Q. Was that also discharged at that section of the pier?

A. No, sir; at five p. m. on Tuesday afternoon we pulled the steamer back into the second section.

Q. You pulled her out, toward the out-shore end?

A. Yes, sir; section two and three.

Q. To sections two and three of the pier?

A. Yes, sir.

Q. How was the steamer pulled out from section one to sections two and three?

A. With her own power.

Q. And then at about what hour was that? Tuesday afternoon after five?

A. That was five o'clock in the afternoon.

Q. Was any discharging continued on that day from the steamer?

A. No. They resumed discharging again on Wednesday morning.

Q. What cargo was discharged on and after Wednesday morning?

A. The balance of the cargo that remained in the steamer was cork, and the balance of general cargo that was left there.

Q. When was the deck cargo of cork discharged?

A. The deck cargo of cork was discharged after the onions were discharged on the pier.

[fol. 112] Q. Was the deck cargo discharged after the steamer had been moved from section one to sections two and three?

A. Yes, that is right.

Q. That is to say, no cargo, cork deck cargo, was discharged while the steamer was in section number one?

A. No; the first thing they wanted discharged was the onions, and that was the first thing to come out.

Q. Now, were you in the steamer's hold or hatches prior to the commencing of her discharge on Monday morning, or were you not?

A. I was down the three hatches where the onions were stowed.

Q. That was one, two and six?

A. That was one, two and six.

Q. Will you kindly describe as nearly as you can recollect, the character of the stowage that you saw in those holds?

A. Well, it was stowed over the crates of cork insulation.

Q. What were stowed over the crates of cork insulation?

A. Crates of onions. And in number one they ran all across the floor and about eight or nine high.

Q. Eight or nine cases high?

A. Eight or nine tiers high. And there was about the height of a man, I would say six feet, head room between the deck of the steamer and where the top tier of the onions was.

Q. In other words, by head, you mean,—correct me if I am wrong,—the distance between the top of the top tier of onion crates and the ceiling, the roof of the hold?

A. That space was vacant.

Q. About how many feet?

A. About six feet.

Q. Was that the same in holds one, two and six?

[fol. 113] A. In hold number two there was a little more. There was about eight or ten feet.

Q. And was the six feet you refer to in number one?

A. The six feet I refer to was in number one.

Q. And eight or ten in number two?

A. And eight or ten in number two.

Q. And in number six?

A. That was about the same as number one.

Q. About six feet?

A. Yes, sir.

Q. Was there in any of those three holds any cargo stowed on top of the onions?

A. No, sir.

The Court: How many tiers were there in number two?

The Witness: About the same height as in the number one; nine tiers.

Q. And in number six?

A. About the same as number one.

Q. Now, will you describe as nearly as you can the method of stowage of the crates and the cases?

A. They were stowed head and head.

Q. And by that description, head and head, could you say just what you mean, in other words?

A. One crate over the other on its head.

Q. We had a crate here a moment ago. Which of these sides is the head?

A. The top, with the red label. Either side you could call a head.

Q. You mean, either the top or the bottom?

A. Yes, sir.

Q. And how does the thickness of those two boards compare with the thickness of the other strips that are around the box?

A. The thickness of the head is practically twice as thick as the other boards.

[fol. 114] Q. Both heads are the thick boards?

A. Yes, sir.

Q. And they are about twice as thick as the other strips around?

A. Yes, sir.

Q. And is it or is it not correct stowage so to stow crates of onions?

Mr. Joffe: I object.

The Court: That is sustained. There is no claim of the breakage of the crates, so that I do not see that it makes any difference.

Mr. Loomis: So that, there being no question as to the proper method of the actual stowage of the crates and cases, I won't go into that?

Mr. Joffe: I do not make any such concession as that. We have here experts for that purpose.

The Court: All I meant was that I do not think that there is any claim that it was improper to stow them head to head.

Mr. Joffe: No, we are not claiming that head to head is improper stowage.

Q. Mr. Martinez, then, just tell us how they were stowed with respect to each other? You said they were stowed head and head, but how were they bound together, or related together, in the ship?

A. One tier ran right across fore and aft, and then there was another tier running across athwartship. That went all the way across the floor. Then, the following tier on top of that was the same way, only the tier that ran fore and aft bound the tier which ran -thwartship.

Q. In taking the bottom tier, we will say,—take eight or [fol. 115] ten crates. Just tell us in your own words how they would be stowed together? Would they be stowed side by side, or how? And what blocking would be used, if any?

A. The blocking would be used by its own crate.

Q. How many crates would be stowed up side by side?

A. Well, if you tiered them on the pier, and stowed them in the hold, that's a different thing. If you take the whole width of the steamer as far as cargo battens go, and then the next tier would be stowed exactly over that only in a different manner, that is, with the tier which ran fore and aft, that would be blocking the tier that ran athwartship.

Q. Were there or were there not any air spaces left between the cases as they were stowed, and describe such if there were any?

A. Well, in the number one there was air space around the onions from the cargo battens. In number two and number one also over the onions, that is, between the ceiling and the top tier of the onions. In number two in the forward part of the hatch they were stowed, and there was an air space of two feet running all the way between the two tiers, and number six was also stowed as number one was.

Q. Have you seen many onion cargoes delivered into this port?

A. I have seen quite a few.

Q. How many such cargoes do you suppose you have seen in your capacity as steamship clerk delivered in New York?

A. Well, probably since 1912 I have seen forty, thirty or forty cargoes. We had four in the year 1925, prior to the Vallescura arriving.

Q. And was there anything unusual about this stowage of these onions from what the other cargoes that you have described were?

[fol. 116] Mr. Joffe: I object.

Objection sustained.

Q. Have you been in the same employ of this particular respondent all that time, all these years?

A. No, sir. Only since 1923 with that particular one, but I was with other steamship lines prior to that.

Q. You were with other steamship lines prior to going with them?

A. Yes, sir.

Q. They were the agents of the Vallescura, as I understand it?

A. Yes, sir.

Q. Was it part of your duties to inspect the stowage of the cargoes of onions and other cargoes by going down into the ships and examining them when the ships arrived here?

A. It is part of it, yes, sir.

Q. And it is one of your duties to determine whether the cargo is well stowed or not well stowed?

A. It is, for our own information.

Q. Who was the owner of the Vallescura?

A. The Lloyd Mediterranean.

Q. And your company was the agent of the Lloyd Mediterranean?

A. Yes, sir.

Q. And did the Vallescura make other trips beside this particular one to this port?

A. She did.

Q. Do you remember what she looked like, and in general what kind of a ship she was?

A. Yes, sir.

Q. I suppose you were on her a number of times besides this particular trip?

A. Yes.

Q. Did she or did she not have any bulwarks running along the side, or rails, along the sides of the main deck?

A. Yes, sir, she did have.

[fol. 117] Q. What were they made of? Plates?

A. Steel plating.

Q. Were they solid bulwarks, running alone so that you could see through if you looked?

A. Yes, they were, and open at each side of the hatches.

Q. That is to say, they were capable of being opened?

A. Capable of being opened, yes, sir.

Q. Do you remember whether the steamer Vallescura on this particular trip was laden to her plimsol marks when she arrived?

A. No, sir.

Q. What was the ordinary deadweight tonnage of the ship that she would take when laden to her plimsol marks?

A. Her deadweight tonnage is 7800 tons.

Q. How many tons did she have on, approximately, on this trip, when she arrived?

A. About nineteen hundred.

Q. How did that effect her draft in the water?

A. It affected her draft a great deal. That steamer fully loaded draws about twenty-five feet.

Q. And what did she draw on this particular occasion?

A. She would draw about twelve foot six or thirteen feet.

Q. Was that a mean of twelve foot six or thirteen feet?

A. Mean, yes sir. She was about eleven feet forward, thirteen foot six aft.

Q. That would make a mean of something like twelve feet?

A. Yes.

The Court: What freeboard did she have when you saw her?

The Witness: Six foot freeboard.

The Court: When you saw her at the docks?

[fol. 118] The Witness: You mean, from the plimsol mark, or from the waterline?

The Court: As she lay in the water.

The Witness: As she lay in the water, from her draft, she had about thirty feet.

The Court: Thirty feet?

The Witness: Thirty feet.

The Court: How high is the pier from the water?

The Witness: At high tide it might be about three feet high from the water.

The Court: And at low tide?

The Witness: At low tide, I don't know the kind of drop there is there; it might be five feet or six feet.

Q. And in that connection, will you tell us how deep the holds of the ship are in which these onions were?

A. In that steamer, about thirty feet deep.

Q. The cargo hold itself is about thirty feet deep?
A. Yes, sir.
Q. Have you ever seen Mr. Schnell before?
A. Yes.
Q. Do you know him?
A. I know who he is, yes, sir.
Q. Can you say whether or not he was at the pier on Monday morning, the seventh of December, when the steamer commenced to discharge onions?
A. When the steamer commenced discharging the onions, Mr. Sam Schnell was on the pier.
Q. He was there at eight o'clock on that Monday morning?
A. I won't say exactly eight o'clock. He was down there some time that day.
[fol. 119] Q. And was that the Mr. Schnell that testified here?
A. No, sir.
Q. I suppose he is his brother?
A. I believe so.
Q. Do you see Mr. Samuel Schnell in court?
A. No, sir, he is not here.
Q. When did you first see Mr. Harry Schnell down at the pier?
A. It was on a Monday there. He came down later on, probably around noon time.
Q. Around noon time?
A. Yes, sir.
Q. Did you see Mr. Schnell, either one, at any time, commence to open the crates of onions and take some out to examine them, or their employees?
A. I did, yes.
Q. When was that?
A. When they started repacking.
Q. Had you, or had you not, seen them open any boxes prior to their starting repacking?
A. Prior?
Q. Yes.
A. No, sir, they did not.
Q. You had not seen them open any prior?
A. No, sir.
Q. When did the repacking commence?

A. The repacking, I think it was around December fourteenth or December twelfth. I have a memo of it. I can look it up.

Q. Yes. Tell us when it was.

(Witness refers to book.) December 14.

Q. It was on December 14th?

A. December 14th.

Q. And you had not seen any crates opened by anybody prior to that time?

A. We opened some crates down—no, sir.

Q. You started to say, "We opened some crates." You [fol. 120] thought you had some record of that, but you have not, I take it?

A. No, sir.

Q. Did you see any of the onions after they were opened, after you saw crates opened?

A. We examined the onions from the first day they started to discharge. I mean, the superficial examination.

Q. Looking at the onions inside of the crates?

A. Looking at them from the outside without cutting or any interior examination.

Q. Just describe in a general way what the condition was as you saw it. Just describe it.

A. The crates were dry and the onion appeared ripe and also dry.

Q. Was that all the observation you had to make of it?

A. We made another observation on December eighth. Crates dry. Onions appeared to be O. K., and we had the cargo on the pier covered with tarpaulins and paper.

Q. Why did you cover them with tarpaulins and paper?

A. In case frost might set in and damage the cargo, and it was also requested by Mr. Schnell.

Q. Did you notice any sprouting there?

A. Yes, we did notice some sprouting. We noticed some sprouting when I examined them in the hold, and some onions you could see had some black spots and bruises, and also had a film of dry dirt. That I remember very plainly because I particularly remarked about the film of dry dirt.

Q. Was that dirt? Were these spots black spots?

A. Yes.

Q. And that was a sort of film of dirt?

A. Yes, it might be.

[fol. 121] Q. You don't know what the dirt was?

A. I don't know what the dirt was, no, sir.

Q. You noticed that both in the hold and when they were on the pier?

A. Yes, sir.

Q. I have a book here. Did that come from your records?

A. Yes, sir.

Q. Did you have anything to do with the preparation of that book?

A. I did.

Q. It is the delivery book, is it not?

A. Yes, sir.

Q. The book for the delivery of the cargo from the pier?

A. Yes, sir.

Q. What does it contain in general?

A. It contains a receipt of the cargo delivered to the consignee.

Q. Delivery from the pier to the consignee?

A. Yes, sir.

Q. Did you take receipts from the consignees when they took their goods away from the pier?

A. I took receipts from the consignee for the complete cargo.

Q. And how many cases and crates approximately were there in the complete cargo?

A. 25433 crates 832½ cases.

Q. Will you tell us when the twenty-five thousand odd crates and cases were delivered, lot by lot, and how they were receipted for?

A. Delivery started on December 15th. We delivered three truck loads and one lighter load.

Q. Was that all on that day?

A. That was all on that day, yes, sir. From the consignees or the order given by the consignee by the party taking delivery.

Q. Did they actually sign the book?

A. Yes, sir, they did.

[fol. 122] Q. Was it receipted for as a clean delivery or not?

A. It was.

Mr. Joffe: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained. The book speaks for itself.

Mr. Joffe: I have no objection to the book being received in evidence.

Q. Can you by refreshing your recollection from the book tell us whether those lots were receipted for as a clean delivery?

Mr. Joffe: I object. The book is the best evidence.
Objection sustained.
The Court: The consignees sign that book?
The Witness: The consignee signed on the book, yes, sir.

Q. Will you show me the page that has those three deliveries you spoke about to the fifteenth of December?
A. The pages are not numbered here; but this is it.
Q. Are all the entries and figures on the page that you have indicated to me in the delivery book, in your hand writing, or in somebody else's handwriting? I am speaking of everything but the signature.
A. They are all in my handwriting.
Q. Are the signatures here, the signatures of the people that took delivery?
A. The respective people who took delivery of that merchandise.
[fol. 123] Q. Are the entries there correct?
A. Yes, sir.

Mr. Loomis: I offer that particular page in evidence.
Mr. Joffe: I have no objection to the page and the signatures. I have no objection to the page and the signatures of our employees, but I have objection to anything above the page which has no part in the thing that they signed for.
Mr. Loomis: That is understood.
Mr. Joffe: You will see what happened on the line on the top.
Mr. Loomis: Oh, we do insist on that. The argument has been made here that all the lots taken away from the pier were not good.
The Court: I will overrule the objection and receive it. You may argue that point.

(Book at that page marked in evidence, Respondent's Exhibit A.)

Q. Now, will you take the same delivery book after that page "A", and show us the next page that contains a record of the delivery of some of these onions?

A. The next page shows a delivery of half cases of onions which were delivered on December 15, 16, 17, 18, 19.

Q. How many lots?

A. Six.

Q. And the handwriting again on that page, other than the signatures, is your handwriting?

A. With the exception of two lots which my assistant entered here.

Q. Which are those two lots?

A. The second and the last entries.

[fol. 124] Q. Are you, or are you not, able to say whether those entries are correct?

A. They are correct.

Q. You verified them at the time?

A. Yes, sir.

Q. And the signatures there are the signatures of the persons that took the delivery of those respective lots opposite their names?

A. That is right.

Mr. Loomis: I offer that page in evidence.

(Page marked: Claimant's Exhibit B.)

Q. And were those deliveries on that page by truck, or by lighter, the page marked "Exhibit B"?

A. All by truck.

Q. Now, the next page; show us that as a record of delivery?

A. December 17, 9, 9, 21-22.

Q. It that all shown on the page, or does it run over to the following page?

A. It runs over to the following page.

Q. And is all that your handwriting on there, except for the signatures?

A. With the exception of four entries.

Q. Were those made by your assistant?

A. Yes, sir.

Q. Are the entries on that page, and the Exhibit B, the page we have just marked in evidence, correct?

A. They are.

Q. Are the entries on the page immediately following, that contains the left-over from the preceding page, correct?

A. Yes, sir.

Q. And the signatures there are the signatures of the persons that took delivery of the respective lots from the pier?

A. They are.

[fol. 125] Mr. Loomis: I offer in evidence the page of which we have been speaking, together with the page immediately following, which contains the continuation.

(Pages marked: Claimant's Exhibits C and D.)

Q. Now, are there any other pages in the book that contain notations of deliveries made of lots of those onions?

A. No.

Q. And are the pages that you have indicated, the complete record of such delivery of onions as was made from your pier?

A. Right.

Q. That is, Exhibits A, B, C and D?

A. Yes, sir.

Cross-examination.

By Mr. Joffe:

Q. Would you have delivered one package of this cargo to anyone other than the persons signing this book?

A. What persons?

Q. The person taking the cargo?

A. No.

Q. If he wanted to sign for you an ordinary receipt, would you have permitted him to take the cargo off the dock? An ordinary paper, "Received So-&-So"? Answer yes or no. Would you insist on him signing this delivery book? Answer yes or no, please.

A. I can't answer that. Receipts are taken in the delivery book.

Q. So no one can remove merchandise unless they sign the delivery book?

A. Absolutely.

Q. And if they don't want to sign the delivery book, they can't have their merchandise?

A. They must follow our system of delivery.

Q. If they do not sign your delivery book, they cannot [fol. 126] have their merchandise?

A. If we have no delivery book, then we have them sign a delivery book?

Q. If they do not sign your delivery book which you give them for their signature, they cannot have the merchandise?

A. If we have no delivery book, we have a receipt, and we have them sign a receipt.

Q. You had a delivery book in this case?

A. We did.

Q. And unless the person taking the merchandise off your dock, wanted to take delivery, they could not get it without signing your book?

A. That is the delivery book.

Q. And there was no other way, except by signing the delivery book?

A. There is no other place in the port of New York that they can get it.

Q. What was your occupation?

A. My occupation was chief clerk and superintendent of the pier.

Q. Where was your office?

A. On the pier.

Q. What part of the pier?

A. The south side, on section one.

Q. You stayed in your office most of the time, didn't you?

A. No.

Q. You walked around the pier during the discharge of the steamer?

A. During the discharge of the steamer I walked around the pier.

Q. And as your duty of delivery clerk, you have to examine the steamer before it began to discharge?

A. Not as the duty of delivery clerk, but as being an officer of my corporation.

Q. Were you an officer of your corporation in 1925?

A. Yes.

[fol. 127] Q. What was your office?

A. Secretary.

Q. And because you were secretary, you made all the examinations you testified to?

A. I did. I beg your pardon. What is that question?

Q. Didn't you hear it?

A. No.

Q. And because you were secretary, you made all the examinations you testified to?

A. I made all the examinations, yes.

Q. You had a plan, a cargo plan, of this steamer, didn't you?

A. I don't believe we had, no.

Q. The steamer came into port without a cargo plan?

A. They do occasionally, yes, sir.

Q. What did they do in this case?

A. They had no plan. I didn't see any plan.

Q. You did not?

A. No.

Q. That was rather unusual, for a steamer to come into the port without a cargo plan showing where the cargo was stowed?

A. No, that is not unusual.

Q. It is not?

A. No, sir.

Q. Do you remember examining hatches one, two and six?

A. Yes, sir.

Q. Did you make that examination because you found that in hatches one, two and six, were onions?

A. I did.

Q. You were not interested in the other hatches?

A. We were not.

Q. Will you tell us the dimension of your hatches one, two and six? Were they the same?

A. No; one and six were about the same and two was larger.

Q. Will you tell us the dimension of the cargo compartments in one and six?

A. The cubic dimensions?

[fol. 128] Q. About how large is one and six, if they were about the same?

A. Are you talking of the dimensions of the hold or of the hatch?

A. The dimensions of the hold.

—You want an approximate figure?

Q. Yes.

A. Well, number one would be about forty-five feet wide, at some points, and less than that at some other points of

the hatch. It would be about thirty-one feet high in certain parts of the hatch and it went about fifty-five or sixty feet fore and aft. In number two it went all the way under, to the third hatch under the bridge, and it had two ways of getting into it. You might call it a bridge hatch, or hatch number three, or two-bis. It was probably about eighty feet long, about the same height, and about fifty feet in width.

Q. How about number six?

A. Number six was a little larger than number one hatch.

Q. Just a bit larger?

The Court: Is this not all susceptible of very accurate proof?

Mr. Joffe: We asked the captain and he did not know.

Mr. Loomis: We have a plan of the ship here.

The Court: You may recall the witness if they do not produce the accurate proof.

Q. There was other cargo in hatch number two, with the onions?

A. There was, yes, sir.

Q. And that cargo consisted of what?

A. It consisted of almonds and cargo of cork, and some bags of peanuts, and canned goods.

Q. And did you find almonds and peanuts in the crates [fol. 129] of the onions as you removed them from the steamer to the pier?

A. With the crates of onions?

Q. Yes, loose almonds and peanuts with the crates of onions as you removed them from the steamer to the pier?

A. I did not.

Q. You examined it very carefully?

A. I did.

Q. Did you examine carefully the discharge of the cargo?

A. I did, yes.

Q. And you found no loose peanuts?

A. No.

Q. And no loose peanuts in the onions?

A. No, not in the onions. We had some loose peanuts on the dock.

Q. And do you know whether the peanuts and the almonds were stowed in the number two hatch?

A. They were stowed in the after end of the number two hatch.

Q. And were those discharged simultaneously with the onions?

A. They were discharged after the onions were discharged.

Q. After?

A. Yes, or when the onions were practically all discharged.

The Court: Contemporaneously?

The Witness: That is what I meant. You can call it contemporaneous.

The Court: Contemporaneous is not afterwards.

Q. Was there any dunnage between the onions and the cargo?

A. There was.

Q. You are sure about that?

A. Yes, sir.

Q. Would it surprise you if I told you that the captain swore that there was not? Or do you want to change your testimony?

A. No, I wouldn't change my testimony.

[fol. 130] Q. Was there any dunnage between the rows of onions?

A. No, sir; I didn't see it.

Q. So that there was no space left between the rows of onions for ventilation?

A. There was ventilation on the side of the onions.

The Court: That is not what he asked you. He asked, was there any space left between the rows of the onions for ventilation.

The Witness: Between the rows?

The Court: Yes.

The Witness: I don't remember.

Q. That is the best answer you can give us, that you don't remember?

A. Yes, sir.

The Court: You do not remember whether there was or not?

The Witness: I don't remember that there was any space in between.

The Court: Was there, or was there not?

The Witness: There was space, yes, on each tier, but not in between the compact packing of the dunnage.

Q. You want to say that the onions were solidly stowed, but that spaces were left around the entire stow?

A. Yes, sir.

Q. You do not intend to say that there were any spaces left in between the rows of onions for ventilation?

A. There was in number two hatch, yes, between the forward part and the after part of the stowage.

Q. That space was left because the number two hatch had two sides, and could be entered from two different places?

A. No, sir; you have that wrong.

[fol. 131] Q. And you would not change your testimony if I called your attention to the testimony of the captain, who swore that there were no spaces left, would you?

A. I can only say what I see.

Q. You did not remember a few moments ago, when the judge asked that question.

A. I did not get the judge's question right.

Q. And your dimensions that you testified to in this case are definite?

A. I said, approximate. I didn't measure the steamer. I can only go by my own recollection of what the length, width and height of the steamer was.

Q. And if the testimony of the captain is different from yours, would you change your testimony, because you have made only an approximation?

A. He has figures to go by. I am only going by my recollection. I may recollect it seventy, or a hundred or a hundred and seventy-five.

Q. And as to stowage, the captain's recollection, according to you, would also be better, because he had that ship in charge. Isn't that so?

A. It all depends on what time his testimony was made.

Recess to 2:15 p. m.

New York, Nov. 22, 1928, 2:15 P. M.

Case continued.

Examination of the witness VINCENT MARTINEZ, continued:

Cross-examined by Mr. Joffe.

Q. Mr. Martinez, since the adjournment yesterday up to the present time, did you read the testimony of anyone [fol. 132] given in this case?

A. I did not.

Q. Did you look at it?

A. No, sir.

Q. What time did you say the ship came in and docked?

A. What time?

Q. Yes.

A. She was in quarantine at 9 o'clock in the morning.

Q. What time did it arrive at the dock, I asked you?

A. Around noon.

Q. Around noon?

A. Yes.

Q. And you are sure that work was done on that steamer that Saturday?

A. In rigging up there was, yes, sir.

Q. Did you see the steamer immediately as it docked?

A. I did.

Q. Was the deck cargo lashed?

A. Was it what?

Q. Was the deck cargo lashed?

A. The deck cargo, no, was not lashed.

Q. And you saw it; did you know that the captain in his protest claimed for a loss on deck cargo because of storms?

A. I didn't see his protest.

Q. You did not see his protest?

A. No.

Q. And when you examined that deck cargo you found cargo on top of the hatch No. 4?

A. On top of the hatch No. 4, yes.

Q. How about 5?

A. 5—I don't think there was any over No. 5.

Q. And there was none over 1, 2 and 6, that you are sure of?

A. Yes, sir.

Q. And the cork that you saw on top of hatch No. 4 was not lashed?

A. Was not lashed, no.

Q. Nor anywhere else I assume?

A. No.

Q. Now, let us go back to hold No. 1, and tell us how [fol. 133] many tiers high was the cargo?

A. How many tiers high?

Q. Yes, that's right.

A. That I didn't know, I didn't know how many.

Q. Was there more than one tier of cork?

A. There was, yes.

Q. Would you say there were as many as three?

A. I don't know, I didn't count.

Q. You testified that there were 9 tiers of onions on top of the cork?

A. I estimated that, yes.

Q. You estimated that too?

A. I did.

Q. Would you say there were as many as five tiers of cork under the onions?

A. I couldn't say.

Q. Could you tell us what was the size of each package of cork?

A. I can, yes, there were some crates of cork 3 ft. long by 2½.

Q. And how were they stowed?

A. How were they stowed?

Q. Yes.

A. They were stowed on the side.

Q. So that each tier was 2½ ft. high, is that right?

A. Well, yes.

Q. How deep was the vessel in the hold, do you know?

A. How deep?

Q. Yes.

A. About 30 ft.

Q. Did the steamer have any between decks?

A. No.

Q. Was there anything between the cork and the onions?

A. There was dunnage.

Q. You are sure about that?

A. I saw some dunnage, yes.

Q. Do you know the number of tiers that was in holds No. 2 and No. 6?

A. I don't know.

Q. You will not even make a guess?

A. I won't, no.

[fol. 134] Q. Do you know how many tiers of onions were there?

A. I say there were about 9 tiers of onions there.

Q. In each hold?

A. In each old, 8 to 9.

Q. And will you say now what was the distance between the ceiling of the hold and the last tier of onions?

A. In what hatch?

Q. No. 1.

A. In No. 1, it was a little over a man high, it might be 6 or 7 ft.

Q. And in the Nos. 2 and 6?

A. No. 2 was a little more than No. 1, it might be 8 or 9 ft. And No. 6 was about the same as No. 1.

Q. You have an independent recollection on that?

A. I have.

Q. You haven't measured it?

A. I haven't measured, but I sized it up pretty good.

Q. And you wouldn't say, if the captain swore there were only four, that he was correct or mistaken?

A. I don't know what the captain said.

Q. And it wouldn't make any difference to you if the captain swore that there was nothing between the cork and the onion cargo?

A. It makes no difference to me, no.

Q. You saw the dunnage?

A. I saw the dunnage, yes.

Q. And it wouldn't make any difference I assume to you that the captains said there was nothing in hold No. 2 except cork and onions?

A. There was out of cargo No. 2.

Q. You are positive of that?

A. I am positive of that.

Q. You spent a good deal of time on this steamer?

A. I do on all steamers.

Q. How long did you spend on this steamer?

A. From the day she started delivery to she finished.

[fol. 135] Q. How long were you on the steamer?

A. On and off during the day until the time she sailed.

Q. How often during the day?

A. I may stay on the steamer two or three hours and stay on the pier; stay on the steamer supervising the discharge,

and perhaps be called to the 'phone and answer it and go back again.

Q. Didn't you have independent stevedores to discharge this steamer?

A. We did under our supervision.

Q. And you supervise the discharge of the steamer?

A. I do, yes, sir.

Q. And you give orders to the stevedores what to do?

A. I do.

Q. On this steamer?

A. On this steamer and on all our steamers.

Q. You said Samuel Schnell was on the steamer—on the pier?

A. He was there several days, yes; he didn't stay there during the discharge, but he was there on and off.

Q. Did you see this gentleman there, Mr. Vidal?

A. I saw him there some times, yes.

Q. Are you sure he wasn't there during the discharge?

A. He may have been there, yes.

Q. He signed for your cargo?

A. No, Samuel Schnell didn't.

Q. Who signed?

A. His representative, for some of it.

Q. Are you sure of it?

A. Yes; let me look in my book.

Q. Before I show you the book, and the gentleman I indicate, Mr. Louis Schnell you say was only there from time to time?

A. Mr. Sam Schnell was there from time to time.

Q. Look at your book and see who signed for your own cargo.

A. The drivers of the trucks.

[fol. 136] Q. Show we where?

A. There is R and S (looking at Exhibit A), and B, C and D——

Mr. Loomis: I would like it noted on the record that counsel is now showing Exhibits A. B. C and D to the gentleman in the back of the room referred to.

Q. Now, where do you say it was signed by the drivers?

A. Where?

Q. Yes.

A. The trucks?

Q. Yes. This lighter——

Q. Now, you told us it was signed by the drivers of the trucks! I ask you to show me where; isn't it a fact that the only signature on that book which you have outside of the captain's and the lighter's is the signature of Louis Schnell?

A. It is not.

Q. Well, show me where?

A. On Exhibit A, 175, L——

Q. Where is there the signature of any drivers, except the captains of the lighters which took the cargo from your steamer?

A. Where is what?

Question withdrawn.

Redirect examination.

By Mr. Loomis:

Q. I think when you were asked about the matter this morning the question was put to you were those signatures the truckman's or the lighter's?

A. The truckmen, lightermen and Mr. Schnell's and the vessel.

Q. Now, that you have begun you might give us the signatures on Exhibit B.

Mr. Joffe: Let him indicate which are the truckmen.

[fol. 137] A. Exhibit B?

Q. How many truckmen or lightermen?

A. Six truckmen.

Q. How many lightermen?

A. No lightermen on that.

Q. And any by Mr. Schnell on that Exhibit?

A. No.

The Court: Or by anyone else?

The Witness: By anyone else there is.

Q. By whom?

A. By either the truckmen taking delivery of the merchandise.

Q. But beside the six truckmen?

A. Beside the six there are no other signatures.

Q. Now, on Exhibit C?

A. There are 8 signatures here by Schnell's representative.

Q. Neither truckmen nor lightermen?

A. Neither truckmen nor lightermen. And there is one signature for a lighter by the captain, I suppose.

Q. And any others?

A. And five signatures by truckmen.

Q. Are there any other signatures on that Exhibit beside the ones you mention?

A. No.

Q. Now, on Exhibit D.

A. D there is two signatures, by Schnell's representatives.

Q. And no others?

A. And no others.

Mr. Joffe: How do you define a truckman there?

Question withdrawn.

By the Court:

Q. How do you know they are truckmen?

A. By the truck number and the name of the truckman alongside of the receipt.

Q. Do you mean you know those people?

[fol. 138] A. Well, I am pretty well acquainted with the signatures; I also know Schnell's representatives signature.

Q. Who is he?

A. There is one here, Carbone, and Broncati.

By Mr. Loomis:

Q. How much would an ordinary truck move, of bales?

A. We have truckloads of bales of 300 and truckloads of 159.

Q. And are the deliveries to the gentlemen you say were the truckmen—are those deliveries within the amount that the ordinary truck holds?

A. Right.

Q. And those delivered to the lighters I suppose are greater in amount?

A. Well, yes.

Q. Now, Mr. Martinez, to turn from the subject we have just been discussing, but still devoting our attention to that delivery book, if the consignee or his representatives wished to note that certain of the cargo was delivered in

bad order and condition would you do anything or would you not do anything to prevent their doing so?

A. No, we don't in any way; we have signatures here which shows that the cargo was damaged.

Q. In other words, you put no obstacles in their way to note bad condition if there is bad condition?

A. No, if the condition is there we have them note it accordingly.

Q. Was any protest lodged in any way, shape or form by the individuals who took the cargo?

A. No, not at the time the delivery was going on.

Q. Did anyone claim, taking delivery of the goods, that they were in anything except good order and condition?

A. No, there weren't.

[fol. 139] Q. Now, another thing, Mr. Martinez, you spoke this morning of hatches—and this afternoon too—about hatches 1, 2 and 6; how many actual hatch openings were there on the ship?

A. On the ship?

Q. Yes.

A. I think there were seven.

Q. Were you including in your designation 1, 2, 3, 4, 5 and 6 this morning; were you including the deep tank, or were you not including the deep tank?

A. Was I——

Q. Were you counting the deep tank as a hold in your testimony, speaking about hatch No. 6?

A. I think I was, yes.

Q. Where was the deep tank on the steamer, forward of the engine room or aft of the engine room?

A. It was forward.

Q. Then forward of the engine room were hatches 1, 2 and the deep tank?

A. 1, 2 and the deep tank.

Q. And aft of the engine room there were the hatches 3, if you call the deep tank a hatch, there would be hatches 4, 5 and 6?

A. If the deep tank is known as No. 3, why then you call the after hatches of the engine room 4, 5 and 6.

Q. But if you didn't include the deep tank as a hatch in your designation, the hatches aft of the engine room would be 3, 4 and 5?

A. Yes.

Q. Was the hatch that you speak of as No. 6 also known at times as No. 5?

A. It may have been, yes, it all depends on how you count your hatches.

Q. It all depends on whether the deep tank was or was not considered a hatch?

A. That's right.

Q. What kind of cork was this which was carried on the [fol. 140] deck of the steamer Vallescura, and also on certain of the holds?

A. Manufactured cork and insulation.

Q. Not green cork, insulation?

A. Not green cork.

Q. Now, which was that which came out of the holds 1, 2 and 6?

A. They were crates of insulation, and also bales of cork waste.

Q. Was that cork manufactured product or not?

A. No, it was not manufactured product.

Q. Was it cork that had been treated in any way, or was it the green cork?

A. Well, I don't know whether you would call it green cork, it goes through a certain process before it is baled, it is properly dried out or pressed or something.

Q. Was it dried cork?

A. It was dried, yes.

Q. Dried cork?

A. Dried cork.

Q. And the insulation cork had been manufactured you say, how had that been treated?

A. Why I understand that it is ground cork waste mixed with a solution of gum arabic and placed in forms and baked in ovens.

Q. And that is the cork insulation?

A. And it comes out in slabs running from one to three and four inches thick and about a foot wide and about three feet long.

Q. And that is what you describe as cork insulation?

A. Yes.

Recross-examination.

By Mr. Joffe:

Q. Are you serious when you say that the goods which were delivered after the 14th of December as shown in your book, the entire cargo, was in good condition?

A. It was, yes, sir, it was cargo that was re-packed by the consignee.

Q. Is it a fact you saw that only, the cargo that was re-packed under this delivery book?

[fol. 141] A. No, I wouldn't say that, but it was cargo that was in good condition and cargo that was re-packed.

Q. And you as secretary of the Company knew nothing about the claim made long before the 14th of December, that the cargo was in bad condition?

A. Did I what?

Q. (Repeated.) And you as secretary of the Company know nothing about the claim made long before the 14th of December that the cargo was in bad condition? This cargo—the entire cargo that came on the steamer?

Mr. Loomis: You are talking now about this particular lot?

The Court: He is talking about the entire cargo.

Q. (Continued.) —on this particular steamer, was in bad condition, and a claim was going to be made against your steamer; didn't you know anything about that?

A. Yes, I did.

Q. There was a letter dated December 12th, and up to that time no deliveries were made of any kind?

A. Yes.

Q. And up to that day, and on the 14th, you have a receipt for the entire cargo in good condition?

A. Yes.

Mr. Loomis: He didn't testify that; he testified he had receipt for that in good condition delivered to lighters and trucks. It is misleading.

Q. Do you say now that the entire cargo for which you hold receipts here was delivered in good condition?

A. The entire cargo except what was condemned by the [fol. 142] Board of Health was in good condition, and the bad was separated from the good, and there were only

3,000 left and the balance was delivered in good condition.

Q. Are you positive about that?

A. I am positive.

Q. Did you testify just a short time ago that it was all good, mentioning nothing about the 3,000 condemned by the Board of Health?

A. I didn't say it was all good; I testified that I had receipts for the complete cargo in my book.

Q. Haven't you got a receipt for the entire cargo in your delivery book?

A. I have, yes.

Q. And that the entire cargo which you have in the delivery book is signed as in good condition?

A. With the exception of 3090 crates.

Q. Where does it say that?

A. Board of Health, right alongside of it.

Q. You are showing me Exhibit D, are you?

A. I am.

Q. Is Exhibit D in any different form than A, B and C?

A. It is.

Q. How?

A. By mentioning the Board of Health alongside of it.

Q. Who mentioned the Board of Health?

A. I did, with the consent of the consignee.

Q. Where is that consent?

A. Well, by his signature alongside of it.

Q. Where does it say that it was in bad condition?

A. It doesn't say that, but it says it was condemned by the Board of Health.

Q. Does it say on the top the same way by A, B and C, in good condition——

The Court: Why argue that? I can read at least.

[fol. 143] Q. Now, Mr. Martinez, isn't it a fact that the entire cargo was not re-conditioned on your——

A. The entire cargo was gone through and examined.

Q. Isn't it a fact that it was re-conditioned? Are you trying to avoid the word "re-conditioned"?

The Court: Don't argue with the witness.

Q. Was the entire cargo examined on the steamship dock?

A. No.

By Mr. Loomis:

Q. What was done with it on the pier?

A. It was examined, each case went through, and those that needed re-packing was re-packed, and those that didn't were delivered as good cargo.

WALTER G. COCKS, being duly sworn and examined as a witness for the claimant, testifies:

Direct examination by Mr. Loomis:

By Mr. Loomis:

Q. Mr. Cocks, you are a cargo surveyor?

A. Yes, sir.

Q. Will you just tell us what your experience has been in that line?

A. 19½ years at sea before being a surveyor, and 9½ years in New York surveying ships and cargoes.

Q. And what is your firm?

A. The firm of Pilcher & Cocks.

[fol. 144] Q. And you are the Mr. Cocks of Pilcher & Cocks?

A. Yes, sir.

Q. In the course of your business as such cargo surveyor how many cargoes approximately do you survey during a given year?

A. Different years of course different numbers, it runs into thousands, different kinds of cargoes, and ships, of course.

Q. And does your examination of cargo include also examination of onion cargoes?

A. It does, yes, sir, it includes all kinds of cargoes.

Q. How many onion cargoes have you examined in your lifetime?

A. I don't know, sir, I shall have to refer to records; I think every ship coming in here we do, but whether I personally do it depends on where it comes from.

Q. How many would that run into?

A. I couldn't say off hand.

Q. Would it be fair to say that it ran into hundreds?

A. It does run into hundreds, yes.

Q. Now, in connection with your examination do you examine the stowage of the cargo in the holds to see whether the stowage is in good order?

A. We examine the holds for stowage, yes, sir.

Q. Do you remember the steamer Vallescura on a trip she made to this port on or about December 5, 1925?

A. Yes, sir.

Q. Did you have anything to do with the surveying of the cargo and the stowage of that steamer?

A. With the surveying of the stowage, yes, sir.

Q. Just tell us when you went to the ship for that purpose.

A. The first trip to the ship was at 9.15 A. M. on December the 15th.

[fol. 145] Q. That was on Monday?

A. That was on a Monday, yes.

Q. You arrived at the ship at 9.15 A. M.?

A. Yes, sir.

Q. Do you know Mr. H. Schnell?

A. There are three Schnells, which is Mr. H. I am not sure.

Q. Do you see this gentleman sitting over there on that side of the table?

A. Yes, sir.

Q. Can you say whether he was present on the pier or around the pier at the time when you arrived there on the morning of December 7th at 9.15 A. M.?

A. He may have been there but I don't know.

Q. You don't recall having seen him there?

A. Not on that date, no, sir.

Q. What did you do when you arrived at the vessel?

A. I went on the vessel and looked at the cargo on the dock, and walked along the dock and saw what cargo was on the dock, and went on the vessel, interviewed the chief officer, went around the ship fore and aft, went down in the hatches, which were open, and noted the cargo which was still on deck.

Q. And still in the holds?

A. And still in the holds which were open.

Q. Now, when you got there and you took note of the cargo on the pier, what cargo was on the pier at that time when you got there? Have you any note of that?

A. Yes, there was some crates of onions on the pier, some cases of pimentos,——

Q. That is what they make cheese of?

A. There were some bags of peanuts, and a few boxes of dried fruit.

Q. And into what holds did you go when you went about on the ship?

A. Nos. 1, 2 and 6, counting them as hatches.

[fol. 146] Q. And will you describe what you saw in those holds?

A. No. 1 hold, it is a single deck ship, there is no between decks in the forward end of the ship; about one hold was open and under the square of the hatch 8 ft. down there were crates of onions in the after end, there were crates of onions, yes; in the forward end there were dried fruit and crates of canned goods; I noticed the condition also of the hold inside.

Q. What was the stowage in hold No. 1, was it good stowage or bad stowage?

A. As far as could be seen at that time, of course, everything was all level and spar ceiling good, that is cargo battens, shell plating, sweating heavily, and under deck slightly sweating, also the coamings.

Q. Were sweating?

A. Were sweating.

Q. Was or was not the stowage what you call good stowage?

A. It was good.

Mr. Joffe: I object to it; he should describe the stowage first.

The Court: He may describe it afterwards.

Q. Will you tell us, if you will, please, how the crates of onions were stowed in hold No. 1, that is to say whether head and head, or——

A. The crates of onions were stowed as usual on the heads; there are no remarks here, I believe there wasn't anything the matter with the stowage.

Q. Is that a proper stowage, head and head?

A. It is proper and usual.

Q. And were there air spaces provided for the ventilation of the cargo?

[fol. 147] A. Yes, in No. 1, I have no record of any air spaces, that is the air spaces you refer to in No. 1.

By the Court:

Q. Are you testifying from your record or your recollection?

A. From my record, and mingling the two together, sir.

By Mr. Loomis:

Q. Was there or was there not any space overhead above the top of the onions?

Mr. Joffe: May I suggest that Mr. Cocks tell us all about this without being led; he is an experienced witness, he has testified before this Court on numerous occasions; let us have his story first, and then Mr. Loomis can bring out anything additional. He is being led as to things that I think are not justifiable.

The Court: It carries more weight to have the witness tell his own story.

Q. Will you go on then and tell us.

A. This record of course, is taken day by day, in the ship that we are surveying now it refers to the first time that I visited the ship on Monday morning; then, there was very little cargo discharged from the vessel at that time on the first visit down there, it was in the forward end, there were still boxes of dried fruit and cases of canned goods marked CA and underneath the square of the hatch there were crates of onions, and in the after end of the hatch crates of onions and crates of cork board, these came [fol. 148] from on deck, between the deck head and the cargo there was a space of 8 ft.

Q. Yes.

A. The cargo was carried out——

Q. And that was perfectly free that way?

A. Yes, head room, that is over the top of the cargo and the deck head.

Q. Amounting to what?

A. 8 ft. The cargo was carried out as far as the spar ceiling, and the spar ceiling I note was in good condition and in place. The shell plating was sweating heavily and under deck slightly, also the coamings.

Q. Were sweating?

A. Were sweating. There was nothing to cause any comment as regards the stowage otherwise than that; that was the condition of the stowage.

Q. In other words you had no complaint to make of the stowage?

A. No, it was such as we would embody in our report as 1.

Q. Is that all?

A. That is all in No. 1.

Q. Was there the usual amount of provision for ventilation in the hold?

Mr. Joffe: I object to the form of the question, if the Court please, usual amount.

By the Court:

Q. Tell us what provision was made for the ventilation.

A. In the No. 1 hold there were four ventilators, two forward and two aft, and there was this 8 ft. of headroom left over the cargo, which is more than is usual.

By Mr. Loomis:

Q. More than sufficient for good stowage?

A. Oh, yes, more than sufficient.

[fol. 149] Q. And sufficient for the ventilation of the cargo?

A. Oh, yes.

Q. Do you want to add anything to No. 1?

A. No.

By the Court:

Q. There is some question as to whether the onions were piled solid or with spaces between the piles of boxes for further ventilation; do you know what the fact was as regards that?

A. In No. 1 hatch there was no cross-ventilation, that is, no cross channels left between the crates, as far as I could see at that time.

By Mr. Loomis:

Q. With the air spaces left in there was that at all necessary?

Mr. Joffe: Objected to.

The Court: I will take his opinion.

A. With that amount of headroom it is not necessary for the upper tiers to have ventilation; there are no cross channels left.

By the Court:

Q. How about the lower?

A. At that time, sir; I couldn't see how far this went down, there were so many onions on the ship.

By Mr. Loomis:

Q. By the upper tiers you mean the 8th or 9th?

A. I couldn't see down there because it was all over the hatch.

Q. But I mean when you say upper tiers, you mean tiers distinguished from the cargo in the bottom of the hold?

A. Yes.

[fol. 150] By the Court:

Q. How many would you say in your opinion it is proper to stow solid without leaving additional passage ways?

A. As far as you can stow onions solid, that would apply to five or six tiers.

By Mr. Loomis:

Q. Now, going into hold No. 2, what did you find there?

A. In the forward end of No. 2 hold, that is also a single deck, we had bags of pimentos and also crates of onions; in the after end we had crates of onions with a 15" air space left across between the stow, just underneath the after part of the coamings. We found the onions in the crates to be growing, sprouting, some of the sprouts being 9" long; the under deck were sweating and the sides were sweating. That stowage was quite all right.

By the Court:

Q. And how were they stowed again in No. 2?

A. In the forward end we had crates of onions and also in the after end except in the forward end we also had bags of peanuts.

Q. Were they stowed on top or under them or beside the onions?

A. Some of them were over the crates of onions. And between the upper tiers of cargo and under deck there was 6 ft. space, the spar ceiling or cargo battens, I have noted here, were good and in place. On the forward deck there was cork on deck at that time.

By Mr. Loomis:

Q. Going back to No. 2 again, you say the headroom was what?

A. Six feet from the under side of the tiers to the top of the cargo.

[fol. 151] By the Court:

Q. Were the onions stowed solid, or was there a passage-way?

A. There was a 15″ space left.

Q. Where?

A. Just underneath, after part of the hatch coamings.

Q. 15″ of space between what?

A. Between the crates—(the witness illustrated with books on the Judge's desk). There is a whole space of 15″ right across the vessel, the coaming of the hatch comes here, and right underneath the after part of the hatch is this space, or it was in this vessel.

Q. That ran all the way athwartships?

A. Athwartships, yes, sir.

Q. That was the kind of space you show?

A. Yes, sir.

By Mr. Loomis:

Q. Was there space along the sides?

A. The cargo came as far as the spar ceiling, which would leave a 9″ space between the cargo and the shell plating.

Q. So that all the way around the sides there would be that 9″ space?

A. Oh, yes.

Q. And to sum up you found, I believe, that that stowage was all right?

A. Quite all right.

Q. Now, then, were you down in hold No. 6—you said something about deck cargo?

A. On the forward deck, in the wings of the hatches we had bales of cork, crates of cork board.

Q. That was on the forward part of the ship?

A. That was on the forward deck.

Q. And none of that cork had been discharged on the pier when you got there?

A. I didn't see any.

[fol. 152] Q. And was there also cork stowed aft of the engine room on the main deck?

A. Yes, sir; we had it there.

Q. Where was that stowed?

A. According to my way of reckoning it was stowed abreast of No. 5 and over the top of No. 5 hatch.

Q. That would be on the other, No. 4?

A. Taking it the way you explain it, 3 high on the deck and 2 high over the hatchway.

Q. And none of that cork had been discharged when you got there?

A. No, sir; that was in place.

Q. Did you go down into hold No. 6?

A. Yes, sir.

Q. Tell us what you found down there.

A. Practically the same conditions we found in the forward, we had boxes of dried fruit and bags of peanuts, and the wings and aft crates of onions, a number of them heavily stained and every one with sweat, and the onions sprouting; there was 6' headway over the top of the cargo and the deck head; I may say in No. 2 and No. 6 there were four ventilators.

Q. In both No. 2 and 6?

A. In both No. 2 and 6.

By the Court:

Q. What did you say about 6 ft. of headroom?

A. Between the top of the cargo and the deck head.

Q. That is the roof. Any other air passage?

A. Between the spar ceiling and the shell plating.

Q. What do you mean by that?

A. The shell plating is the skin of the ship, that is the [fol. 153] steel plating of the vessel, well inside that plating there are frames up and down, or ribs, and then inside those frames there is a spar ceiling, that is wood between 17" and 18" wide, ½" thick, running fore and aft about 2 ft. apart, fore and aft of the vessel.

Q. What is 2 ft.?

A. In a vertical line.

Q. And what is apart?

A. Separated from each other.

Q. Slats, you mean?

A. Yes, sir; the frames come down vertically, and this wood runs along this way on the cargo side of these frames, and between here and here (indicating) would be from 15″ to 2 ft.

Q. So that back of that lattice which is open there is air?

A. There is air, there is 9″ between that lattice and the side.

Q. It is a lattice work?

A. It is; these are the iron beams, vertically, and here is what is called the spar ceiling.

By Mr. Loomis:

Q. And that condition also obtained in hold No. 1?

A. Yes, I made particular note of that sparing.

Q. In hold No. 1 what was that, read it again.

A. The spar ceiling good and in place; that is to say it was all complete.

Q. And so that there was that ventilation in hold No. 1 in the sides?

A. In No. 1 and 2 and 6, just the same.

Q. And then to sum up your impression of No. 6, the stowage in there was all right, was it, there was nothing to complain of?

A. Except that I noticed heavy sweating in that hold.

[fol. 154] Q. But I mean as far as the stowage there was nothing to complain of?

A. There was nothing to condemn, no.

Q. But you did note heavy sweating in No. 6 as well as 1 and 2?

A. In all the three holds, particularly in the shell plating, and lightly overhead there was sweating, and the cargo in No. 6 was affected more than in 1 and 2.

Q. That was affected most by the sweating?

A. Yes, the crates were discolored.

Q. And was the sprouting more than in the other holds?

A. No, it varies in size up to 9 inches; I particularly mention that in No. 2.

Q. You think there was more sprouting in No. 2 than in 1 or 6, in view of your record?

A. I don't think there was a great deal of difference.

Q. They were about the same in all three holds?

A. Approximately the same.

Q. What do you say about that condition, as to its being usual or unusual to find onions with sprouts on them 9" long?

A. We have had it many times before, oh, yes.

Q. What is the percentage, would you say, of cargoes of onions that are ordinarily affected by sprouts?

Objected to.

Objection sustained.

The Witness: It is rather too much.

Q. Was that all the damage that you noticed to the onions?

Mr. Joffe: I haven't noticed that there was any damage; I object to the form of the question.

[fol. 155] Q. Is sprouting considered damage?

A. It depends of course by whom; we have maintained that it doesn't damage the onion to any appreciable extent, but I notice that the consignees throw them all away.

Q. So the consignees considered them damaged onions?

A. Yes, and we have objected to that on several occasions, and on this occasion.

Mr. Joffe: Objected to. I have no objection if he can say.

By the Court:

Q. You say "we have objected"?

A. I am speaking of we as Pilcher & Cocks; I might say that I on this occasion did object on December the 17th to the way they were throwing away some of the onions.

By Mr. Loomis:

Q. What were they doing?

Mr. Joffe: I have no objection if he mentions the names, but he doesn't say to whom.

Q. Do you know who it was made to?

A. The objection was made on December the 17th—to Mr. Schnell.

Q. Which Mr. Schnell, the one who is sitting there by the table?

A. I think that was the one, but I wouldn't swear to it; but he came down there—but the three of them are always there, I think they are, and I am liable to be mixed up as to which they were.

[fol. 156] Q. When was that?

A. That was when I met Mr. Schnell on December 17th at 10.30; Captain Jiannon was also there, and when quite a number of crates were opened at the time, and he was noting the condition; that was after, he, I understand, complained about that, and they were throwing out sprouted onions, and at that time there was an objection made to it.

Q. On the ground that the onions were still good and could be used?

A. On the ground that a number of the onions they were throwing out could be used here in New York.

Q. Did Mr. Schnell appear to be in a hurry to get rid of these onions, or——

Objected to.

The Court: It is grossly suggestive, argumentation and everything else.

Withdrawn.

Q. Did you notice anything unusual in the attitude of Mr. Schnell?

A. I did note, and I embodied in the report that there was an unusual speed in getting rid of the onions and in the way they were re-conditioning them.

Q. That was December 17th, you say?

A. Yes, sir.

Q. When did you go back to the pier the next time?

A. After December the 17th?

Q. Yes.

A. I don't think I was on the pier again—oh, yes, I was on the pier the 23rd of December.

Q. What did you find on the pier that time?

A. There were a large number of crates that had been condemned by the Board of Health, I understood that there [fol. 157] were 3090 crates and 17½ bags that had been con-

demned and lying around the pier; some of them were smashed where trucks had run over them, and they were in a general messy condition, broken boxes and so on.

Q. Can you tell me whether it is or is not a fact that there is always a certain percentage of damage in onion cargoes?

Mr. Joffe: Objected to as incompetent, irrelevant and immaterial, and as conjectural in that it may depend on so many different things and so many different conditions, and will be trying new issues which are not in this case.

By the Court:

Q. Have you ever seen an onion cargo which was not in any way affected by transportation?

A. No, sir.

Cross-examined.

By Mr. Joffe:

Q. Didn't you testify before that you did see such a cargo where there was no damage of any kind, but that they were very rare, on previous occasions in this Court? Yes or no.

A. Let me get the question?

Q. (Repeated.) Didn't you testify before that you did see such a cargo where there was no damage of any kind, but that they were very rare, on previous occasions in this Court?

By the Court:

Q. Did you ever testify in this Court that you have seen such cargoes without damage?

A. I don't think so.

Q. Did you ever testify that such cargoes without such damage are possible but very rare?

[fol. 158] A. I may have done that, that it is possible, but I don't remember now any time saying I had seen a perfect cargo.

By Mr. Joffe:

Q. Now, Captain Cocks, tell us, do you consider it good stowage to have any cargo on the top of onions? Yes or no, please.

A. There is a whole lot in that; it would depend, of course, on how much cargo was put on top of cargo.

Q. Bag cargo placed on onions, would you consider that good or bad stowage?

A. If there were a considerable number of bags stowed over the onions, it is not a stowage to be commended.

Q. Is that as far as you could go, to say that it is not to be commended, or would you say it is bad stowage?

A. I say it is stowage that could not be commended.

Q. Why not?

A. Because, having any large amount of bags over the cargo would possibly affect the ventilation.

Q. Only possibly?

A. Well, that seems to answer the question.

Q. What is the most important element in the transportation of onions?

A. I take it the free circulation of air.

Q. And you have made an awful lot in testifying to-day about the air circulating around the sides of the ship throughout the steamer?

A. I don't think I made an awful lot, I answered questions.

Q. And isn't it a fact that steamers must have that, or otherwise stowage is absolutely bad, because the iron sweating will permit the sweat to come down on the cargo and it will be absolutely ruined?

A. There are more questions than one there; there is no [fol. 159] question of must; it depends on the cargo; with a bulk cargo it is not necessary to have a spar ceiling there, but with certain cargoes you have them to prevent sweat touching the cargo.

Q. And certainly that would be true of onions, wouldn't it?

A. Undoubtedly.

Q. So that any cargo that has no battens on the side of the ship, the stowage is absolutely bad when it affects the onions?

A. If there were no cargo battens there and you stowed onions in the hold where they came against the side, the stowage would be absolutely bad, yes.

Q. And wouldn't you consider a stowage bad that did not permit air spaces for ventilation of onions in the hold?

A. Not necessarily, it would depend, of course, on the

stowage, the number of tiers you had and where the hold was jammed full the question of having the openings that you describe in the onions is only something of fairly recent years—that type of ventilation has only been developed since all these cases of onions have been coming forward.

Q. How many years?

A. I say in recent years.

Q. How many years, please?

A. Five or six.

Q. And this happened in 1925, so that it was already in vogue?

A. In certain cargoes, where you had a full onion cargo it was in vogue, yes.

Q. What would you consider, as a captain, a proper stow of onions, how often would you put your air spaces in a said cargo of onions?

A. That would depend, of course, on the quantity of onions you have in a vessel.

By the Court:

Q. Well, answer it in those terms, captain.

A. Generally if you had your holds full, or that is jammed [fol. 160] up with onions, you would leave the air spaces in the fore and after end in the cross and then fore and aft you would leave channels, leaving out a crate so that the air could circulate throughout the stow.

By Mr. Joffe:

Q. How many feet apart?

A. Leaving them 6 or 10 ft. apart, these channels fore and aft, and the other would come under the hatch coamings, and often enough to make a circulation throughout the stow.

Q. And how much of the air spaces?

A. The fore and aft throughout.

Q. The fore and aft?

A. You could leave one crate out, the size of the crate.

Q. The size of the crate?

A. When it is stowed on its side it is about 7½ inches.

Q. It was stowed head to head?

A. Then, they are fore and aft, so you can only have 7", looking at it in the fore and aft line.

Q. You told about an air space for circulation of air running across the ship of 15″.

A. I did.

Q. You know that was no air space, as a captain, don't you? That was not left for air space?

A. It was left according to my notes here particularly for an air space, a 15″ air space left across the coamings; I noted it here as an air space when I was down in the ship.

Q. Wasn't that left so that the sweat of the coamings will not come down on the cargo?

A. Of course not.

Q. Wasn't it right under the coamings, captain?

A. I say at the after part of the coamings, if that infer-
[fol. 161] ence was right you would have four channels left all round the coamings, for you would naturally sweat on the fore and aft as you would on the end.

Q. You had battens?

A. The coamings are not on the side of the ship.

Q. So that if the sweat came down it would come down on the cargo according to you?

A. Naturally.

Q. And that naturally would damage the cargo, wouldn't it?

A. I say slight sweating in the coamings, and that would naturally condense on to whatever cargo there was.

Q. That would naturally damage the cargo?

A. No, there is a difference between damage.

Q. And what?

A. The sweating stain; a sweat stain is not a damage.

Q. Well, would it leave dark, black markings on onions and the crates?

A. It would leave the stain of the sweat, drops on the crates, yes.

Q. Now, you said something about speed shown in trying to dispose of the onions; this was in December, wasn't it?

A. This was December 6th.

Q. And you had an unheated pier there?

A. I don't think the pier is heated.

Q. And a cargo of onions is damaged by weather, isn't it, if you have these on an unheated pier?

A. If it is not properly cared for.

Q. So there is the greatest necessity, according to your knowledge of onion cargoes, to see that the cargo leaves the pier as soon as possible?

A. That is hard to say; there are circumstances where the consignees don't want them to leave the pier as soon as possible.

Q. Now, Mr. Cocks, would you consider it a proper care of the cargo to close the ventilators that you describe in [fol. 162] each of the holds containing onions when they are for the purpose of ventilation?

A. I take it they were, yes.

Q. Will you please say as a captain what use you would make of those ventilators so that proper care for the cargo would give it the most ventilation on the voyage from Spain to New York?

A. I am sorry I don't quite understand the question; the ventilators, as long as they are kept open, these ventilators I understand—I don't understand your question.

Q. Well, if the ventilators were kept closed on the voyage every night without any consideration for the weather—would you consider that your cargo was properly ventilated, if you were the captain of that steamer?

A. No, sir.

Q. And you would consider that to be improper ventilation of the cargo?

A. Irrespective of weather?

Q. Irrespective of weather?

A. If they were kept closed?

Q. Yes.

A. Yes.

Q. I will read to you the statement of the captain of this steamer.

Mr. Loomis: Is that in evidence?

Mr. Joffe: Yes, it is in evidence, the deposition—it hasn't been offered yet.

The Court: You may make it the basis of a hypothetical question.

Q. Assuming the facts to be as testified by——

The Court: Leave that out.

Q. —as follows: "In good weather I opened the ventilators in the daytime and closed them at night, and in bad [fol. 163] weather the ventilators were closed at all times". Would you consider that to be a proper ventilation of an onion cargo coming from Spain to New York?

A. In good weather the ventilators were kept open in the day and shut at night, and in heavy weather they were shut altogether—the latter part would be all right, the former part is—they left——

Q. Now, Captain Cocks, doesn't good seamanship require the opening of ventilators trimmed against the wind in bad weather?

A. It depends on the degree of bad weather.

Q. I speak of the weather expected to be had on the North Atlantic in November and December of any year.

A. It depends on your ship; in bad weather it is usual in the North Atlantic to open the ventilators and plug them; if it is not so bad as that you pack your ventilators and cover them with canvas where necessary; you have got to state the exact condition of the ventilators before I can tell you.

By the Court:

Q. Well, is it the rule to close the ventilators so long as it is safe to do so for the safety of the ship?

A. Yes.

Q. And can that be done under all but unusual weather conditions?

A. It can generally speaking, except the forward hatches; in your forward hatches, coming across the weather, you would expect westerly winds, you would unship the ventilators and plug them; that is when the weather gets bad; when the weather is not bad you trim the weather ones back, and if you get rain or spray you put covers on them, and if it gets mild again you unship them, and—it would depend [fol. 164] on the degree of weather you get or expect to get on the following day.

Q. Well, if you were stowing a cargo of onions for a voyage from Spain to New York would you stow them in the forward hatches or in the hatches aft?

A. Well, you could stow them—of course, it would depend on various conditions, but No. 1 hatches are preferable to the others, because if you stow them in the hatches which are near the engine room, irrespective of the weather, there is so much heat—if you put them in close proximity—to avoid the engine room——

Q. You wish to avoid the heat?

A. That is a difference of one or two degrees, but the ends of the ship are considered as good as anywhere.

Q. Is the stern better than the forward part of the ship?

A. No, not better; the stern you see in some ships, and weight in the ship—it depends on the ship and the man who stows it knowing his ship.

Q. Would you unship your ventilators south of 35 crossing the ocean?

A. Not usually.

Q. As a captain, if you were going from Spain to New York what route would you take in November and December?

A. It depends on the ship.

Q. Do you know what route this one took?

A. No, sir, no idea.

Q. I suppose you have crossed the Atlantic in November and December?

A. A number of times, yes, sir.

Q. And you would expect a vessel to pitch, roll and ship water continuously on that voyage?

A. Not continuously, sometimes you may cross in calm seas, and other times it will take you 25 days to make a 14 day voyage.

[fol. 165] Q. Well, did you travel on the voyage from Spain to New York?

A. I have, many times, come from Gibraltar to New York.

Q. Would you consider a voyage across the sea at this time a good voyage that had ten good days out of 19?

A. That is a fair average voyage.

Q. Nothing unusual about it?

A. It is a fair average voyage.

Q. There is nothing unusual about the condition of the weather when you have ten good days on a trip from Spain to New York in November or December?

A. It depends; you might have 13 good days, and then run into four that, according to the newspapers, is the worst you have ever seen.

The Court: Anyone who sails the ocean knows nothing about what to expect.

Mr. Joffe: They are quicker to expect a certain kind of weather at certain times of the year, as Judge Hough said in a decision——

The Court: They are required to be prepared for anything.

Q. Did you testify in this Court about the steamship Clorinda that in your opinion it was bad stowage not to permit or leave spaces in between the cargo of onions stowed in the hatch?

A. Off-hand, I don't remember, but if you have got it all down there, and I did do it, why you can put that in; I have so many cases and so many ships—and of course it would depend on what would lead up to that condition.

[fol. 166] The Court: You are quite right; when you are asked whether you made a statement at some time you are entitled to be confronted with the statement.

The Witness: Thank you.

Q. Can you tell us what is the worst season of the year to cross from Spain to New York, as to weather I mean?

A. It depends on what you get; if you get a bad voyage, that is the worst season, but it depends; sometimes it is December, or January or February, it just depends; sometimes I have gone across in December—I am going back a number of years—and had perfectly calm seas all the way; and I have crossed in August and in the middle of summer and got very bad weather.

LEROY A. MATTHEWS, being duly sworn and examined as a witness for the claimant, testifies:

Direct examination.

By Mr. Loomis:

Q. Mr. Matthews, what is your business?

A. I am Assistant Instructor in the Department of Bacteriology and Sanitation in the Pease Laboratories, 38 West 39th Street, Bacteriologists and Sanitary Inspectors; those are duties that I perform.

Q. What is the name of the Laboratories again?

A. Pease Laboratories.

Q. How long have you been engaged in that line?

A. I have been with the Pease Laboratories since 1912, [fol. 167] with the exception of one year, 1918-1919.

Q. In the course of the pursuit of your work is it incumbent upon you to study plant and vegetable life, and particularly that of onions?

A. It is, yes, sir.

Q. And have you made a study of such life?

A. I have made such studies.

Q. Are you able as a result of that experience to tell us something about the onion and what it is that causes onions to spoil?

A. I can do that, yes, sir.

Mr. Joffe: I object to that, if the Court please.

The Court: He hasn't answered yet.

Q. What is it that does cause spoilage in onions?

Mr. Joffe: I object to that, if the Court please.

The Court: It is sustained as too broad.

Q. I will put it this way, if I may: apart from any animal organism in the onion, or received into the onion, will an onion spoil?

Mr. Joffe: I object to that, if the Court please; it is entire conjecture and has nothing to do with our case.

The Court: I will sustain the objection.

Q. Has it been necessary for you in the performance of your work, Mr. Matthews, to study the causes and conditions of decay in onions?

A. It has.

Q. Are you able to say from how many different causes onions will decay?

A. I can.

[fol. 168] Q. Will you tell us from how many different causes onions will decay?

Mr. Joffe: I object to it as incompetent and irrelevant.

The Court: I don't remember any evidence in this case of any decay; I think your question should be directed to what we have got here in evidence.

Q. Do you know that condition of an onion which is known in the trade as a cooked or baked onion?

A. I am familiar with that, yes.

Q. Is that condition which is known in the trade as a cooked or baked onion a cause of decay or not?

Mr. Joffe: I object to it.
The Court: Let us know what he is talking about.

By the Court:

Q. What do you understand by that?
A. I understand by the expression known by the onion dealers, or called by them as a cooked or baked onion, an onion from which the outer scales have a watery, transparent appearance, instead of the usual opaque white appearance of a healthy, sound onion; the watery transparent appearance is caused by the breaking down of the sound tissue of the onion, due to the effects of bacteria or mould which have gotten into the tissues of the onion have developed and have subsequently caused the breakdown of the tissue, causing it to be slimy, soft and watery. Frequently in the [fol. 169] case of onions you have a growth of mould on the surface. That is the cause of the so-called cooked onion; the word "cooking" or "baked" is very loosely used, as I consider it from a scientific standpoint, because it has not been cooked or baked, it has not been subjected to any bacteria which will cause that kind of a deterioration, it is simply the result of bacteria which have been in the onions, presumably at the time they were loaded, the bacteria being present in such small numbers that the destruction had not progressed to an extent which was noticeable to the sense of feel or to the eye.
Q. Are all onions in that condition?
A. Practically all onions are subject to that condition; they may have bacteria present in them in small numbers, and if kept in cold storage at say 30 to 35 Fahr. they could be kept indefinitely without spoilage; the bacteria and the mould spohrs or seeds require three things for their development, they require food, moisture and temperature; when you get the three things in proper combination they will start developing, they will feed on the food material, they will subdivide and multiply rapidly in the case of the bacteria, and in the case of the moulds they will send forth their filaments, or micelia as we call them, which cause the destruction of the tissues of the onion. When you have a proper temperature that growth is accelerated, it can be retarded by keeping the onions cold, and it can be kept in abeyance so that the onions can be sold and show no evi-

dence of bacterial action, and yet there may be small numbers of bacteria—a few mould spohrs present in the tissue in a latent stage, an inactive stage you might say, where [fol. 170] they are not causing any harm; yet to keep that onion or subject it to such conditions of temperature and moisture as will favor the growth of these organisms, and your onion will be destroyed.

Mr. Joffe: I move to strike it out; it has nothing to do with our case.

Mr. Loomis: He has described perfectly the condition that you have claimed here.

Motion denied.

Exception.

By Mr. Loomis:

Q. Where do these bacteria enter the onion?

A. The usual place of entry of the bacteria is through the neck of the onion, where the stem or the leaves have been cut off at the time that the onion is harvested. It is customary in the case of Spanish onions to cut the neck of the onion. That frequently is done before the leaves are completely dried, and results in a moist end being left exposed to the air; the mould spohrs and bacteria which cause this destruction are found throughout the soil, they may be blown around the fields from onions that have been spoiled and left on the fields——

The Court: Is this pure theory, or have you seen it?

The Witness: This is the way the bacteria get into the onion.

By the Court:

Q. How do you know, have you isolated this germ?

A. I have seen these bacteria microscopically; I have [fol. 171] made microscopic examination of spoiled onions, and I have found the bacteria in them; I have also artificially infected onions by taking an onion which appeared to be normal and sound—that is I have purchased it on the open market as being a good onion—and have been able to cause destruction or the spoilage of that onion by slicing off a portion of the top so that the tissue would be exposed —that is you would have a moist tissue corresponding to the conditions in Spain where the onions are harvested, and

the onions in such a condition can be inoculated with organisms from a spoiled onion by putting a drop of juice or——

Q. It can be inoculated by putting it in a place where there is no ventilation?

A. No, sir, if you have an onion free from bacteria or mould,——

Q. How do you know it is free?

A. You can't be sure it is free.

Q. But your business judgment on the subject seems to be that you have got to avoid those conditions in all onions, good, bad or indifferent or you get this same deterioration. Do you agree with that?

A. The onions should be kept as cool——

Q. Do you agree with the proposition that if you don't do that, no matter what your onions are they will deteriorate?

Mr. Loomis: Without the germs in them?

Q. I don't know whether the germs are in them or not. You don't know?

A. I couldn't answer that in the affirmative—naturally ——

Q. Because you don't know——

A. No, I don't say that I don't know, because if there are [fol. 172] no germs there the onions will keep indefinitely.

Q. How do you know there aren't germs in every onion that grows?

A. I have been able to keep onions for a period of some thirty days at ordinary room temperature, and they seemed to be as perfectly good as they were at the start of the experiment.

Q. Did you ever try to keep them under improper conditions?

A. I have tried to keep them under moist conditions; I have made experiments, purchased onions on the open market from retail stores, and have kept them at temperatures of 98 degrees, 86 degrees, ordinary room temperature, that is the variations between day and night temperatures in the ordinary room, and at a temperature of 68 degrees; I have kept them both moist and in containers with moisture, so that they would be in a humid atmosphere. Some of the onions have lasted for a considerable period in the moist atmosphere, but those which I purchased, which I had no control over, had simply purchased them as being sound

onions suitable for eating, some of them kept and some of them deteriorated very quickly; some of them have produced this so-called cooked appearance.

Q. This is pure speculation?

A. No, it is scientific.

By Mr. Loomis:

Q. Have you with you any samples of onions of that kind here?

A. I have.

Q. Will you get these for us.

A. It is in a bag at the end of the table.

(The witness produces the samples.)

[fol. 173] Q. Now, will you show that to his Honor and let him see——

A. This is an onion from which the outer skin has dropped off because of the length of time I have kept it in the laboratory; that you see is a soft, spongy, watery condition.

Q. And that condition is around the top of the onion?

A. It starts at the neck.

Q. And that is where you would expect to find it from the bacteria coming in at the neck?

A. It is the usual source of infection; the bacteria will also enter from a bruise in digging the onion, if it is cut when packed, or if the pressure of the packing causes the rather tough membrane here on the outer side—if that is broken, that offers ingress for the bacteria or moulds which cause the destruction of the onion. This is an onion, one of a set of 44, on which I have been conducting a test at the laboratory; several of them have been spoiled so that I have discarded them, and before taking them out I have made microscopic examination and have seen that the soft tissues here are loaded with bacteria, or in some cases with moulds, filament; here you see there is a fuzzy growth here, which is mould; but the main infection of this particular onion in my opinion is caused by bacteria; you may have an infection of both mould and bacteria, or either one.

Q. Is it possible to have an infection other than by bacteria or mould?

A. No, sir.

Q. And if the onion has no bacteria or mould in it it will not decay, as I understand it?

A. It will not.

The Court: I don't see the basis for that. The witness [fol. 174] has already said he can't say whether all onions do have these bacteria in them or not.

Q. Is that the case?

The Court: He says he has isolated the bacteria, but I don't know of any case in which he has isolated the onion.

Is it a fact that the onion nature is such that it does have in it bacteria when it grows in a sound state?

A. The onion if grown under conditions where there are no bacteria or mould spohrs in the vicinity will not have bacteria until such time as the neck of the onion is cut off and an opening is left for the bacteria floating around in the air which will easily get into the onion.

By the Court:

Q. Is that theory or experiment?

A. That is the experience of onion growers.

Q. The onion growers tell us here that every onion is liable to that decay if it is not properly taken care of?

A. If it is not properly harvested and dried and taken care of; if the onions are taken up and left on the ground subject to rainstorms, keeping them wet and spattering soil up on to the cut end——

Q. Then, you would disregard all the rules that have been laid down in this Court as to carriers carrying onions so that they are not subject to ventilation, and say that those things can be entirely ignored provided the onions that are shipped are carefully handled so as to exclude [fol. 175] the bacteria?

A. Yes, I can say that, if it is possible to get the onions free from bacteria and mould.

Q. Now, speaking as practical men, that is not possible, is it?

A. No, I wouldn't say it is possible to have every onion in a cargo free from bacteria.

Q. And you have never been able to prove to your own satisfaction, or anybody else's, that any particular onion was free from bacteria, have you?

A. I have kept onions——

Q. No, answer that question; that is a plain question: have you ever been able to prove to your own satisfaction, and if to your own satisfaction to the satisfaction of anyone else, that any single onion that you have had in your possession was entirely free from bacteria?

A. No, you can't say that an onion is free from bacteria; there are bacteria everywhere, they are on the outside of the onion, but the bacteria which cause—there are various kinds of bacteria, and the bacteria which cause the decay of the onion may not be present in the tissues of the onion.

By Mr. Loomis:

Q. Then, to continue, I understand that an onion decays only as the result of bacterial activity in the onion?

Mr. Joffe: Objected to—only as a result it decays from lack of proper care; let him testify if he wants to that that is the only reason an onion will decay.

The Court: He didn't say the only cause of decay; he said [fol. 176] that decay in an onion was accompanied by bacterial activity. Is that correct?

The Witness: It is correct, it is spontaneous, it isn't deterioration of the onion tissues by itself.

By the Court:

Q. That is true of all decay in everything?

A. Yes.

By Mr. Loomis:

Q. There is no such thing as decay in vegetable life except by bacterial activity?

A. Or mould.

Q. And the mould is distinguished from the bacteria by what?

A. The mould is a little heart form of plant life—I must correct that; I have been speaking of this as animal life; the bacteria and mould are both plant life, they have filaments which are capable of puncturing the skin of the onions to a greater extent than the bacteria. The bacteria decay of the onion may affect only one scale, the outer scale may be sound; the next scale inside may be watery, and the next succeeding scale toward the centre may be sound again, due to the fact that the bacteria have affected

only the one scale and have not been able to penetrate through the tough membrane on the side of that scale.

Q. Take for example the exhibit you showed us there as what is known in the trade as a baked or cooked onion; will you describe the progress of that deterioration; was it of one scale first, or was it all at once, or did it come from the inside out?

A. As I made my countings on that, it started close to [fol. 177] the neck, and the spoilage may be a half inch diameter.

Q. And how deep?

A. I couldn't say how deep, because I didn't want to destroy the exhibit, I wanted to let the spoilage progress naturally, and so the depth I could not determine; but the——

Q. What is your own understanding about that?

A. In the case of bacterial decomposition, my experiments and examinations have shown that where bacteria causes the destruction alone very often a single scale may be affected from the top to the bottom.

Q. And then afterward the second scale and the third scale?

A. As the deterioration progresses. In the case of mould filaments or mould infection, that spoilage is more apt to be from the top through all the scales gradually going down to the bud of the onion.

Q. And in this case this would appear to be——

A. This is I believe mostly bacteria, but there is some mould element.

Q. Now, have you that onion there that shows the spohrs, these specimens of plant life that have tentacles or roots that dig into the onion?

A. I have.

Q. Will you exhibit that?

Mr. Joffe: I have no objection if you wish to hear it, but I want on the record that these onions are no part of the cargo.

Q. These are all Spanish onions?

A. They are what I marked.

Mr. Joffe: Do you know whether they were Spanish onions?

[fol. 178] The Witness: They looked like any onions marked Spanish in the trade. I couldn't say I saw the ship they came on.

Q. This shows the mould you spoke of?

A. This is an onion from which the outer scale has been removed somewhat in packing, but this is one form of mould; this is a form which in my opinion does not cause any particular damage to the onion, that is affecting its marketability as manifested by the fact that I bought the onions with the mould present. That black material is the seeds or spohrs of a mould, that is what we call sweat; that in particular does not cause damage, that grows mostly on the outer, dryer scales without penetrating. This, however, is another kind of mould which does cause damage by penetrating (referring now to the baked or cooked onion).

Q. And on the baked or cooked onions that is more serious?

A. Yes, this is more serious because this is a form in which the micelia or roots actually penetrate. I could by means of microscopic examination take some material from down below the surface and in all probability, as I have done in other cases, I would find the micelia of the mould, which I have on the surface found them grow like the root of a tree.

Q. Will you tell us in what conditions these developments of decay which you have pointed out to us occur.

A. This particular onion here, referring to the one that is known as baked or cooked, this is one which has been kept at a temperature of 98 degrees in dry air not subject to moisture.

Q. No sweat in it at all?

[fol. 179] A. No, it has been kept in an incubator at 98 degrees for a period of 31 or 32 days from the 18th of October.

Q. How many onions did you put in there with it, subjected to the same test?

A. At that temperature I have had 12 onions.

Q. And at the end of the 30th or 31st day period what was the relative condition of the other onions as compared with this one; was this the best preserved of the lot or the worst?

A. This is one of the best preserved of those that were kept at 98 degrees Fahr.

Q. What happened to the others?

A. They were so bad that I threw them out after having made microscopic examination of them to determine whether there were bacteria or moulds present, and in each case I found large numbers of either the bacteria or the mould filament.

By the Court:

Q. Were they perfectly healthy onions when you started with them?

A. As far as I could see, I bought them in the market, they were as sound and solid as that onion there; that onion is a few days old, and it has deteriorated.

Q. But you saw no evidence?

A. I saw no evidence; I went to three different places and didn't let the grocer hand me out some onions, but I picked them out, and picked the best onions that were available from the three different batches.

By Mr. Loomis:

Q. And in how short a time was it that you noticed some of those 12 onions beginning to decay in the manner you have indicated?

A. Some of those spoiled in nine days, if my recollection [fol. 180] is correct; the experiment was carried on with 44 onions, and I can't remember exactly.

Q. And at the end of nine days some of the onions had begun to develop the baked and cooked condition which you have described and which is exhibited by the onion shown us here?

A. Yes.

Q. And did you in addition to that make any tests on an onion or onions in a condition of both heat and moisture?

A. Yes. These onions which I produce I divided into various lots, and some of the onions I kept in a dry air at 98 degrees, as I have stated, and the other onions I put into an agate pot with water in the bottom, and an agate plate so arranged that onions could be placed on the agate plate, and then a cover was put on the pot, in that way making a moist atmosphere with the pot, and the onions in the pot were put in an incubator at 98 degrees.

Q. Were they in the water?

A. No, they were protected from the water.

Q. Was there any sweat?

A. I examined that half an hour after and they were then covered with moisture, the onions were cool to begin with, and the change in temperature caused the sweating of the onions.

Q. And soon relatively did those onions develop that so-called cooked or baked condition as compared with the others in the dry air?

A. The onions in the moist temperature spoiled, showed a spoiled condition quicker than those kept in a dry air.

Q. Do you remember about the number of days involved?

A. I think it was possibly seven days.

Q. Did you have any onions there in that condition of [fol. 181] moisture, one in a sound condition, without showing signs of decay beyond seven or ten days?

A. Yes, I had such an onion, among these onions which I put in there was one which kept for a considerable period of time. If I am permitted to refer to the chart I have prepared I can give the exact time that the onions were kept. I had one onion which kept in good condition for twelve days.

Q. And that was dry air?

A. I am speaking of moist air; whereas two of the three onions which I put in the moist chamber spoiled in seven days. I say they spoiled, by that I mean they showed noticeable signs of deterioration; in the process of the test I spoke of their condition as good, fair, poor and bad, showing successive stages——

By the Court:

Q. Do you know of any reason why one should go faster than the other?

A. My knowledge of spoilage of animal and vegetable products leads me to think that some of the onions were more heavily affected by bacteria or mould than the other onions; the more heavily infected onions had a heat sweat and spoiled more quickly than the others.

By Mr. Loomis:

Q. Continue describing the tests that you had. Let me see, perhaps I can shorten this somewhat. This is the table you referred to that represents the results of your tests?

A. Yes.

Q. And the figures at the left on the side going down [fol. 182] from the top to the bottom represent the onion loss?

A. Yes, I purchased three lots of onions, which are marked Lots Nos. 1, 2 and 3; the first two lots, Nos. 1 and 2, I divided and put at various temperatures, 97 and 98 degrees Fahr.

Q. 86 degrees?

A. Like room temperature; and 68 degrees in the dry air only. Lot No. 3,—I purchased sufficient onions so I was able to put them not only in dry air but in the moist temperature.

Q. And the second column of numbers, that is immediately to the right of the lot numbers, shows the number of onions subjected to the test?

A. Yes, I numbered each onion.

Q. Well, you numbered each onion?

A. I numbered them for——

Q. For instance, the first is six, and the next three?

A. 1, 2, 3.

Q. It is 1, 2 and 3?

A. Yes.

Q. And then the figures at the top of the table indicate the days of the month?

A. The days of the month on which I examined the onions; I tried to examine the onions three times a week.

Q. And the next horizontal line of figures immediately under those dates are the days during which the test was made?

A. That is the number of days that the test was in progress.

Q. Now at a temperature of 80 degrees your table shows that with moisture in the air the onions lasted how long before deterioration?

A. With moisture in the air one onion lasted for a period of 30 days, and two of the onions lasted for nine days.

Q. And they were all sound—at least they were purchased as sound onions at the start?

A. Yes.

[fol. 183] By the Court:

Q. What do you mean, lasted?

A. They remained in what I call good condition, that is, they showed no signs of deterioration on the 9th day of

the test; I didn't examine them again until I think the 11th or 12th day, and in between that time, that is, on the next day of examination——

By Mr. Loomis:

Q. That is three days later?

A. Yes, the onion was in such condition that I called it only fair, showing that between those dates the onion had assumed a condition which I call only fair. It is impossible to make a sharp, distinct line of when the onion is good.

Q. And there were pronounced signs of deterioration at the end of nine days in the case of two onions, and in the case of the third it lasted for thirty days without showing any signs of deterioration?

A. Yes.

Q. Now, did you conduct a test by keeping the onions just in a room like this, in ordinary temperature?

A. Yes.

Q. Ordinary room temperature?

A. Yes, simply left them on a bench.

Q. And did you conduct that in a moist temperature?

A. Yes, I had a pot with water in.

Q. How long did those onions last in the temperature of the room without any confinement?

A. In the room all three onions I used from Lot No. 1 were in good condition at the end of 32 days; in Lot No. 2 one of the onions was in good condition at the end of 32 days, and the other two had lasted for thirty days.

[fol. 184] Q. Then did they begin to show signs of deterioration?

A. Then they began to show signs of spoilage. In Lot No. 3 all three of the unions kept in the dry air—when I say that I mean subject to the normal humidity in the room—they were all good at the end of 32 days. And in moist air one onion was good at the end of 32 days, one lasted for 30 days and one lasted for 28 days.

Q. That was in the ordinary room temperature?

A. Yes.

Q. Without any confinement at all?

A. The last three I mentioned were with water present.

Q. But the others you spoke about were simply—were not in moisture at all?

A. No, they were only on this bench.

Mr. Loomis: I would like to offer the paper in evidence.
Mr. Joffe: I don't think it is relevant.

(It is received and marked Claimant's Exhibit E of this date.)

Q. Then as I understand it the mould getting into the onions and causing decay may get in by digging down through the scales?

A. They would get in through an abrasion, through a cut in the scale.

Q. Or a bruise?

A. Or a bruise.

Q. The bacteria could get in the same way, but unless there is a bruise or cut in the onion the only way they could get in would be through the top where the stem is cut off?

A. Yes.

Q. And the extent to which onions harvested in Spain and gathered in the fields having their stems cut and taken [fol. 185] to loading stations or steamship transportation and put on steamships and loaded in the hold—the extent to which they would keep I understand would depend upon the extent of the bacteria, the number of bacteria that were in them, or mould that was in them, and also would depend upon the physical conditions, such as confinement and heat to which they were subject?

A. Yes.

Q. In the course of their handling after leaving the field, where they were harvested——

A. Yes.

Q. Would it be entirely possible for the onion to appear sound and healthy in every way when loaded on to the steamship and still to be infected with this bacterial development and growth and mould growth within the onion?

Mr. Joffe: I object; here is a man who couldn't tell the difference between one onion and another, and has never been on a field, and he is required to answer as to a condition in a thing he has never seen.

The Court: I think he has already answered it—he says he doesn't know that all onions were infected.

Mr. Loomis: What I asked him was might the bacterial germs be in the onion and the onion show no sign.

The Court: He has already said he couldn't.

Mr. Loomis: I want the witness to assume that there is bacterial growth in an onion that has been gathered from the field.

Mr. Joffe: I will withdraw the objection.

[fol. 186] A. It would be impossible for a person to tell whether the onion had bacteria or mould spohrs in it at the time of shipment unless the disease had progressed so that it was obvious.

By the Court:

Q. Why do you say diseased; a perfectly healthy onion you buy in a shop and eat on the table is not a diseased fruit, is it?

A. Your Honor, in speaking of these things——

Q. You have got bacteria, and so have I, are we both diseased?

A. They are both harmless.

Q. They are harmless in you and me.

A. It is possible to have——

Q. You know it is almost certain as a matter of scientific knowledge?

A. It very frequently happens.

Q. Are we diseased?

A. When your condition gets run down, which corresponds to increase of temperature in the hold of a ship——

Q. I don't think you ought to characterize a perfectly healthy fruit as diseased because you believe, though you cannot demonstrate it, that it has got bacteria in it.

A. It isn't diseased if it simply has a few germs which are latent.

By Mr. Loomis:

Q. Is a man that has contracted a typhus germ and before it has made him ill, how long a period is that?

Mr. Joffe: Objected to.

Objection sustained.

[fol. 187] The Court: If I have made a mistake, it doesn't make your mistake right. Next question.

Q. Let us get back then to the other question; can the decay of onions occur on shipboard or anywhere else unless bacteria have entered them and caused the decay?

A. No.

Q. And may those bacteria be in them when they are loaded on to the ship?

A. Yes.

Mr. Joffe: It is conjecture.

The Court: He has answered it ten times, let him answer it again.

Q. Is there any likelihood that an onion would get bacteria so it would decay on the ship?

A. Under certain conditions it might.

Q. What are such conditions?

A. If the onions are wet and the neck of the onion becomes wet, thoroughly saturated, so that the bacteria can move down into the body of the onion, under such conditions they might be infected on shipboard.

By the Court:

Q. How do you know anything of the kind?

A. Laboratory experience teaches us that bacteria will not penetrate through dry material; for instance we have——

Q. How do you know there are any bacteria on the ship?

A. Bacteria are present everywhere.

Q. Have you isolated this bacillus?

A. I have seen it under the microscope.

[fol. 188] Q. Have you ever seen it on shipboard or anywhere else?

A. You can't see it with the naked eye.

Q. Well where have you found it except in an onion?

A. I have seen it.

Q. Have you found it anywhere else except in an onion?

A. I haven't found the bacillus causing this particular decay.

Q. Then how can you say it was present on shipboard?

A. I say that bacilli are present——

Q. How can you say they are present anywhere, if you have only seen it in an onion; it may be in the air, but you don't know anything about it, do you?

A. No, you can't say definitely for it is impossible to do that.

Q. Then it is just as reasonable to answer Mr. Loomis's question to say that the infection can't occur on shipboard as to say it can?

A. No, for this reason, that the bacteria or mould spohrs may be present—I don't say they are—on the surface of the onion, on the outer skin, and the wetting of the onion may carry that into the heart of a substantially sound onion and thereby introduce the infection.

By Mr. Loomis:

Q. Now the degree of growth and development of the bacteria in an apparently sound onion loaded on board a steamship will depend, I understand, upon two factors: the number of bacteria in the onion and the degree of heat to which the onion is subjected and confined—is that correct?

A. Yes.

[fol. 189] By the Court:

Q. Have you ever been able to count the bacilli in an onion?

A. It is laboratory practice to make counts of the numbers of bacteria in various products.

Q. I say, have you ever been able to count the bacteria in an onion, or in any part of an onion?

A. I have never actually done that; it is quite possible to do it.

Q. You have never done it?

A. I have not actually done it.

By Mr. Loomis:

Q. Is it necessary to have one cut to give the testimony you are giving?

A. I will say that in examining these onions I have taken very minute portions of the tissue and prepared it for microscopic examination and seen those of the bacteria in the very small part of the onion which I have examined.

Q. Would it be posible to count them with the microscope?

A. There wouldn't be anything gained by it—it would be possible.

By the Court:

Q. You were telling us a moment ago that the progress depended on how many you started with.

By Mr. Loomis:

Q. Would it be possible to say whether there were ten, or a thousand or a million—to say that the progress of [fol. 190] decay depended upon the number of bacteria present in the onion—would you need to know the precise number to make that general admission?

A. No, you wouldn't have to know to begin with.

Q. But it is a fact, I understand, that the more bacteria there are in an onion the quicker the decay will develop?

A. Yes.

By the Court:

Q. You mean it is theoretically true.

By Mr. Loomis:

Q. Is it a science?

A. General scientific knowledge leads you to know that that is the case; that in the growth of bacteria is a subdivision, one divides into two, and two into four, and if you have only one, theoretically if you start with an onion with a single bacteria there, it is going to take a long- time for that to develop and cause physical evidence of destruction than it is if you start with an onion that has a million bacteria in it at one time, and then they start to divide.

By the Court:

Q. Is there only one kind of bacteria that attacks an onion?

A. There are various kinds.

Q. Have you ever isolated them?

A. I have not made a careful isolation outside of the fact——

Q. Outside of what you have told us?

A. Outside of what I have told you.

By Mr. Loomis:

Q. I don't understand that what you have told us about here are the only tests you have made?

A. No, I have made other tests at other times.

[fol. 191] Q. This test which you have discussed here to-

day, as shown on the blueprint in evidence, is only your most recent test?

A. Yes.

Q. Then is it the case that in a given temperature, whether it be 98 or 86 or 75 or what not, of several onions possessed of different numbers of bacteria, those would first decay which had the greatest number of bacteria in them, and those would decay most slowly which had the least number of bacteria—is that true?

A. Yes.

Q. In that case temperature would have had no particular part to play in the deterioration, but it would rather have been the number of bacteria present in the onions—is that correct?

A. Yes.

Q. I also understand that given a certain number of onions, all with the same number of bacteria——

The Court: That is absurd; no one can ever demonstrate it.

Mr. Loomis: Here is a bacteriologist who has made it a life work.

The Court: I won't give it any effect.

Mr. Loomis: Then I will take an exception, but repeat the question.

Q. I also understand that given a certain number of onions, all with the same number of bacteria, but placed in temperatures respectively of differing degrees, that those onions would decay most rapidly which were placed in the higher temperatures and those least rapidly in the lower temperatures?

[fol. 192] The Court: Do you state the kind of bacteria in any of these, or are they all of a uniform kind?

Mr. Loomis: I mean bacteria that caused the decay in the onion.

The Court: He says there are many kinds.

Mr. Loomis: Any kind or combination.

A. The onions which were at the higher temperature would show spoilage more quickly than those at the lower temperature.

The Court: That is conceded by everybody.

Q. Now suppose we had a given number of onions, each with the same number of bacteria——

The Court: Now Mr. Loomis, I have allowed you to ask that question once.

Mr. Loomis: This is a different question.

The Court: You cannot assume as a basis for a hypothetical question a fact for which there is no evidence, and I will ask you not to do so.

Mr. Loomis: I only wanted to ask this to get in addition to the two elements—get the moisture.

Q. The moisture would tend to increase the incubation?

The Court: We all know it will.

Mr. Joffe: It is conceded, it is stipulated.

Q. Will the presence of moisture tend to develop the incubation or development of bacteria in the onions and ac- [fol. 193] celerate it?

A. The moisture would have little effect I believe on the bacteria on the inside of the onion, for the reason that the onion itself contains so much moisture; the onion itself has approximately 90 per cent of water; the moisture would have an effect on the spohrs or bacteria which might be present on the outside of the onion, and would cause those to grow more rapidly than under other conditions.

Q. And make them more vigorous and enable them to enter the onion more speedily?

A. Yes.

Q. And the moisture would, as I understand, so affect the top of the onion that the bacteria would gain entrance through the top?

A. If the neck of the onion became thoroughly soaked that would be a chance for the bacteria to get in, for it is commonly known in the laboratory that a plug of dry cotton is an effective prevention against the bacteria; we can keep a culture indefinitely in a test tube plugged with a dry cotton plug which has been sterilized, but if the plug becomes wet the bacteria are capable then of finding their way through the wet plug; and that is the same in this case.

Q. And that would be true, of course, in connection with abrasions or bruises on the outside of the onion, the mould or bacteria would enter through them?

A. They would enter through cuts or abrasions.

Q. And the more moisture the surrounding air contained, the more active the material, the more facile they would be in entering in?

A. Yes.

Q. You have seen this crate of onions back here?

A. Yes.

Q. Would such onions so packed in a box and having the [fol. 194] contact they do have with the sides of this box—would they suffer such abrasions or bruises as would permit the entrance of the bacteria and mould?

A. They might suffer such bruises, yes.

Q. Because the lid is squeezed down on them and that would produce a sufficient abrasion to produce that?

A. It is possible that the onions might have the skin broken.

Cross-examined by Mr. Joffe:

Q. You have testified in this court before on these subjects, haven't you?

A. I have.

Q. Were you ever in Spain?

A. No.

Q. Did you ever see the Spanish onions grow?

A. No.

Q. Did you ever see them on the field?

A. No.

Q. In fact you wouldn't know, unless a merchant gives you an onion and says it is a Spanish onion—you are not able to say whether it is a Spanish onion or not?

A. I know an onion of this type is known as a Spanish onion.

Q. Isn't it a fact that you testified it was a Spanish onion only because the box was marked Spanish Onions?

A. I saw it was.

Q. Isn't it a fact that onions have come for years in this kind of box?

A. No.

Q. Mr. Loomis contends that you have made a life study of onions; how many hours and days have you spent in the study of onions?

A. I have made various experiments during the past four or five years I should say.

Q. Have many hours and days have you spent on it?

A. I couldn't say that; the experiments have been conducted at different times; this experiment for instance has [fol. 195] been conducted over a period of 32 days; it doesn't mean I have spent my entire time on it.

Q. I assume that the onions you bought came over from Spain and were carried by steamer?

A. That is the assumption I had.

Q. And they were here for some time?

A. I bought them in the retail market.

Q. And so far as you know they were sound onions, you wouldn't hesitate to eat them?

A. Yes.

Q. And after you started to fool around with them for 30 days you found bacteria in them?

Objected to.

Q. Well, after the experiment which you have described you found bacteria in them?

Mr. Loomis: He found evidence of decay.

Q. Did you ever find such a thing as a neck rot in a Spanish onion?

A. Yes.

Q. Isn't the onion you have shown us today in this Court known as a neck rot in this country?

A. It is known as neck rot, yes.

By Mr. Loomis:

Q. That neck rot onion is also known as an onion that is baked or cooked?

A. This onion here is what I take as being called by the importers as baked or cooked.

By Mr. Joffe:

Q. Did you ever hear them called baked or cooked in your presence?

A. Not in my presence.

Q. Did you ever see these onions from that particular steamer?

A. No.

[fol. 196] CHARLES M. LEE, a witness for the libellants, recalled.

Cross-examination.

By Mr. Loomis:

Q. Have you brought up with you the documents you had here yesterday?

A. Yes, sir.

Q. When you testified for the libellants?

A. Yes, sir.

Q. Have you the manifest of the Vallescura there?

A. Yes, sir (it is handed to counsel).

Mr. Loomis: On second thought I will permit you to stipulate if you will——

Mr. Joffe: Don't permit me——

Mr. Loomis: What I wanted to show was that Mr. Joffe in reading off the entries of the manifest yesterday, no doubt inadvertently read the last numbers first, or indicating that the onion cargoes had been loaded aboard at Denia and Gibraltar, and then the ship had gone to the port for the cork and loaded the cork afterwards. As a matter of fact the manifest shows, and all of the papers show, that the cork was loaded first at Palamos and the other ports, and that the last ports visited by the ship before sailing for New York were Denia and Gibraltar, no cargo being taken on after those ports. Now if Mr. Joffe will stipulate that——

Mr. Joffe: I will not stipulate that, because I didn't read them out of order.

[fol. 197] The Court: You can agree between yourselves as to how it ought to be on the record.

Mr. Loomis: In view of the attitude of counsel——

The Court: I don't care about the attitude, you may read anything you want.

Mr. Loomis: I want to read from the manifest; and I will ask the witness first.

Q. The manifest shows at the top the date of sailing from the particular ports, does it?

A. I don't know, I haven't examined the manifest.

Q. Well, this is the manifest, isn't it (showing witness paper)?

A. Yes.

Mr. Loomis: Well I want to read it: Manifest of the cargo on board the Vallescura, Captain M. B. del Degas, bound from San Feliu to New York, sailed the 30th of October, 1925, and having on board the various cargo mentioned on that voyage, consisting of household furniture——

The Court: All you want is a negative, no cork.

Mr. Loomis: I want to show the cork was loaded first—consisting of case of household furniture and bales of cork, and of tine cork shavings. And I read from the manifest the sailing of the steamer from Palamos to New York on the 3d of November, 1925, with the cargo that appears on the manifest, as follows: Crates of cork board; crates of [fol. 198] cork insulation; crates of cork lathing and slabs; crates of cork battens; bales of cork; bales of cork discs; bales of manufactured corks; crates of cork board and of dyes, and crates of cork insulation in mould form, and bales of cork waste, and other cork products of divers amounts and descriptions.

Then I read further: The manifest entry of the sailing of the steamer from Gandia—I have difficulty getting at this place, but it looks to me as if it was from Gandia on the 6th of November, 1925, and consisting of the following goods: 1850 cases——

The Court: That is all onions?

Mr. Loomis: I don't see any mention of onions; I see 1850 cases, but after that is the word "paper"—and then on the 10th of November on the other sheet I read the sailing of the steamer from Denia, and on that appear a great number of cases, which must be onions.

The Court: Any cork?

Mr. Loomis: No cork on this one or the Gandia; and it shows all the onions apparently that were taken aboard both at Gandia and Denia.

The Court: Is there any dispute about the cork being put on first?

Mr. Joffe: There can't be, because the cork was under the onions.

[fol. 199] WALTER G. COCKS, a witness for the claimant, recalled.

Direct examination.

By Mr. Loomis:

Q. Mr. Cocks, would it or would it not be improper for the master of a vessel, after keeping the ventilators open all day or night, to close them in the case of sudden showers to prevent an inrush of water?

Mr. Joffe: There was not testimony of showers, and it is an assumption of fact that has not been proven. I object on that ground.

The Court: If that is so I will disregard it, but you may take his answer.

A. Opening the hatches of course in the day time and shutting them at night time is quite proper and it is usual.

Q. In other words it would be the proper thing to do?

A. Oh, yes, quite, quite.

Q. If the captain anticipated that sudden showers might develop at night, or that the ship might ship seas at night, should he or should he not take the same precautions in connection with the ventilators?

A. That would be left to his discretion, if he anticipated getting sudden showers it would depend on his discretion.

Q. He should do it then?

A. It would be left to his discretion.

Mr. Loomis: That is our case, your Honor, with the ad-
[fol. 200] dition of the commission under which the deposition was taken of the master of the steamer, Captain Dulbecco, together with four of the exhibits therein referred to and thereto attached.

Mr. Joffe: I object to the exhibits attached to the deposition on the ground that it is not in the English language.

Mr. Loomis: I want to offer at the same time a translation of it.

Mr. Joffe: And also for some reason or another they have taken photostatic copies of two or three pages and offered them instead of their book log.

Mr. Loomis: It isn't available, the master testified.

The Court: Do you object on the ground that it is a copy or it is an incomplete copy?

Mr. Joffe: On the ground that it is an incomplete copy——

The Court: Do you concede that it is a partial copy?

Mr. Joffe: No. I object to the introduction of the assumed photostatic copies of the log because it appears on the face of it that it is not an original log, and further that it is not a complete log.

The Court: It is taken subject to objection.

Mr. Joffe: And I ask Mr. Loomis to submit a copy in English.

Mr. Loomis: I will. And may the present copy be marked now in evidence, and I will submit a copy to Mr. Joffe?

[fol. 201] The Court: In question and answer form, if you will do it that way for me.

(The translation of the commission is marked in evidence Exhibit F, of this date.)

Mr. Loomis: We are satisfied that it is a correct copy, and if you find it is will you tell us? I am satisfied that it is, we had our usual translator do it. If you have any doubt about it I would be glad to submit it and stand corrected.

Mr. Joffe: Was it translated by your client here or some individual translating bureau?

Mr. Loomis: I can't say.

The Court: The only way you can check it is to have it independently done. It will be received subject to correction.

George H. Cooke, being duly sworn and examined as a witness for the libellants, testifies:

Direct examination.

By Mr. Joffe:

Q. Please tell us quickly your age and sea experience?
A. 62 years of age, 52 years following the sea.
Q. What papers do you hold, captain?
A. Master's in sail and steam, seventh issue.
Q. How long have you held that paper?
A. 35 years, seventh issue.
Q. What ships did you command?
A. It is quite a string.

[fol. 202] Q. Well, tell us in most recent years.

A. I will give you the last seven years. The Black Diamond; The Bolivias; Ellsport; Victoria; Canoset; Eastern Town; Storm King and The Chelmsfield, in one Company.

Q. What Company is that?

A. Black Diamond Steamship of New York.

Q. That will be sufficient. What was your activity during the War, what was your commission, and what steamers?

A. I ran all during the War until the last six months of the War to England and Italy; the last six months I was Lieut-Commander in the Navy.

Q. And prior to that time did you sail between Mediterranean ports and the port of New York?

A. For many years.

Q. Can you tell us about how many years?

A. Well at least six years.

Q. Did you carry perishable cargo of considerable quantity during those six years?

A. Yes.

Q. Do you consider onions perishable cargo?

A. Yes, but I never carried them.

Q. What perishable cargo did you carry?

A. Lemons.

Q. Did you see onions carried on any steamers?

A. I have.

Q. How often?

A. Quite a number of times, as the Mallory Line steamers ran to the same dock that we did, which was the Army Base, Brooklyn.

Q. Do you consider ventilation a great factor in the carriage of onions?

Mr. Loomis: I object to the witness testifying about the [fol. 203] ventilation required for onion cargo when he himself never carried any onion cargo.

The Witness: I didn't say I never carried any, I said not from the Mediterranean.

By the Court:

Q. Have you ever carried them?

A. Yes, in the American Line and the Mallory Line.

Q. Recent years?

A. No, 1904, 5 and 6.
Q. In large quantities at that time?
A. Yes, quite large quantities.
Q. Full cargo?
A. No, not full, between decks full.

By Mr. Loomis:

Q. In crates or boxes?
A. In crates.

Mr. Loomis: I submit that experience would not qualify him, not only because the conditions from the Gulf Ports to New York are different from the Mediterranean ports to New York, but because the Spanish onions have been shown to be different——

Objection overruled.

Q. (Repeated.) Do you consider ventilation a great factor in the carriage of onions?
A. I do.
Q. Will you tell us how onions should be stowed for proper ventilation.

Objected to.
Objection overruled.
Exception.

A. Onions or any perishable food product should have at least 3 inch dunnage on the bottom on the deck, first go [fol. 204] off, lying fore and aft, the dunnage; that is the proper way. Then from four to five tiers, from three to five tiers, either one, and another length of dunnage to allow a good circulation of air between the bottom tier of onions and your next above tier; then your head space overhead will give you the ventilation. With your ventilators trimmed and your hatches opened covered and they can be left open night and day; they can be left open night and day with the tarpaulins over them, and subject to the officer on watch, his orders, in case of water coming on board; that is the night orders.

By Mr. Joffe:

Q. Would you require lanes between, if the stow is nine packages deep, and how often?

Mr. Loomis: Objected to.
The Court: I will take it.

Exception.

A. I would require it.

Q. From your experience would you say that a stow that is across the entire steamer without any lanes between, the entire hatch without any lanes in between, nine tiers high, each tier about 18 inches—would that be a good stow of perishable cargo?

Mr. Loomis: The same objection, unless the captain is told what the conditions present.

[fol. 205] By the Court:

Q. I will put it to you captain: Would you consider it proper stowage if the hold of a freight steamer of 7800 dead weight tons, in one of five hatches, having five holds and a deep well as well—to stow onions on top of other cargo in nine tiers, there being four ventilators in the hold, and a distance two forward and two aft, with head room of 8 ft. and a space of 9 inches between the steel plating of the ship and the cargo battens, without any passageways between the bulk of that cargo?

Mr. Loomis: May I also register this objection?
The Court: Do you want to add anything?
Mr. Loomis: Yes; and it is not known how many crates of onions are in that mass.

Q. (continued:) And there was some other cargo in the forward part of the hold—assuming those facts would you say that that was proper stowage of the onions in that hold?

Mr. Loomis: And entirely independent of the number of the crates in the hold; there is no testimony as to the number; where there was no air passage in the No. 2 there was an air passage——

Q. Well, I will put it this way: assuming that only half the hold, of the dimensions I have stated, contained a mass [fol. 206] of crates of onions, would you say that that was proper stowage?

Same objection.

A. Do the onions go out to the ship's side?

Q. They go out to the battens, which were 9 inches from the steel plating.

A. Well I should say that it would be poor stowage; there is no ventilation can get through those onions.

Q. What would you do in such a case?

A. I would have dunnage put on three or four tiers high from the bottom tier, let it go two tiers or three tiers and another lot of dunnage, and raise them up two or three inches, and with your onions packed on top of that again that will give a thorough circulation of air through your onions; that is the way I would do it.

By Mr. Joffe:

Q. In a voyage across the Atlantic in carrying onions, would you consider it proper care of your cargo to close the ventilators on a night in good weather?

Mr. Loomis: Objected to on the ground that the captain was not present when the ventilators were closed and therefore cannot know what conditions were obtaining on board the ship.

Objection overruled.
Exception.

Mr. Loomis: Further, he never carried any onions across the Atlantic.

[fol. 207] Overruled.
Exception.

Q. Will you please answer that question.

A. I would not consider it proper.

Q. Would you as a captain having experience at sea, require the ventilators to be trimmed both day and night in good weather?

Mr. Loomis: Objected to on the same ground.
Same ruling and exception.

A. Absolutely I would have.

Q. Will you please tell us whether it is customary and constantly done to show in a log entries of opening and closing hatches and attending to ventilators.

Mr Loomis: Objected to.
The Court: I will let him state what he usually does.

A. I will state that the insurance requires it.

It is stricken out.

Q. What is your own practice as to the entry in the log with reference to the opening and closing of hatches and attending to ventilators?

A. It is always entered, opening and closing hatches, in the night order book, which is issued for the officer of the watch through the night carries the order to trim ventilators and close hatches in case of water coming aboard that will get down below.

[fol. 208] Q. If the ship returned to Gibraltar after leaving that port to fix the engines, is it customary and usual to enter it in the logbook and into the protest they returned?

Mr. Loomis: Objected to.

The Court: I will take it.

Mr. Loomis: How can this man say what is the custom for an Italian shipmaster? He can't say what he would do.

The Court: I will take it subject to the objection and only give it the weight I am satisfied it deserves.

A. I should say it is.

Cross-examined by Mr. Loomis:

Q. Captain, you have never carried any Spanish onions?

A. No.

Q. You have never carried any onions across the Atlantic?

A. Well, sometimes we call bulbs onions; yes, I have carried lots of those.

Q. Didn't you testify on your direct examination that you never carried onions?

A. I never carried Spanish onions.

Q. Did you ever carry onions across the Atlantic?

A. No.

Q. And you never have carried any onions since about 24 or 25 years ago anywhere?

A. No.

Q. You say you put dunnage under the onions in the bottom of the hold. Will you describe what kind of dunnage that would be?

A. Regular dunnage, boards six inches side.

Q. What do you mean?

A. Well, dunnage is dunnage.

[fol. 209] Q. Will you describe it?

A. Six inches side, about 7/8 thick, that is dunnage.

Q. How long? A. It comes in various lengths.

Q. Well, how long would you have it?

A. It would be according to the size ship I was in.

Q. You would have it laid right down on the floor?

A. Three inches high.

Q. Covering the bottom of the floor?

A. No, I didn't say that.

Q. What did you say?

A. I said three inches high, one lay of dunnage.

Q. You mean covering the ship?

A. It goes fore and aft of the ship and two or three lines, the size of the cargo, on top of the dunnage to hold it off the ceiling of the deck.

Q. I don't get you at all. The ship is 40 ft. wide we will say?

A. Yes.

Q. We will assume that. This steamer was considerably more. You say you would have three lines of dunnage extending aft?

A. Three or four or five, it doesn't make any difference, according to the size of the ship.

Q. What did you say?

A. I said I would have it the size of my crates, to separate them.

Q. A crate is 18 inches?

A. Yes; the dunnage would be 17 inches.

Q. Then you would not have three lines of dunnage extending aft, you would have about 18 or 20 lines of dunnage?

A. Possibly, according to how much it cost to floor over, and the kind of cargo you had.

The Court: You would have it under all the cargo?

The Witness: I would have it under all the cargo.

[fol. 210] Q. You would have under each crate of onions on the floor blocks of dunnage that would block the crate up?

A. Exactly, three inches.

Q. And how wide did you say the boards would be?

A. Six inches about, that is the general size of dunnage.

Q. Then that would practically cover the floor of your hold, if the blocks were six inches wide and you had them near enough together to support the 18" crates?

A. No, the dunnage is only on each end of the crate, there is a space between—I can't explain it any different.

Q. What would prevent these boards coming together?

A. They can't come together, the weight will hold them firm.

Q. They wouldn't come together, the ship wouldn't work them together?

A. No, sir.

Q. You wouldn't have them blocked off in any way whatever?

A. No, sir.

Q. Your crates are stowed, we are assuming, head and head, that is the testimony here?

A. Yes.

Q. So that the bottoms of the crates consist of boards about an inch and a half thick?

A. Yes.

Q. And they are fitted right together one against the other?

A. Yes.

Q. And they are resting solidly on the dunnage that you have described. Now how could any air get up through them?

A. The air will be between the spaces, won't it?

Q. But there would be no spaces.

A. I am telling you there are.

Q. There would be no spaces between the boxes—how could there be?

[fol. 211] The Court: There would be spaces under the dunnage.

Q. But how would the air get up through?

A. I don't know how it would circulate.

Q. You think it would circulate?

A. Absolutely.

Q. You think it would circulate through five tiers, but you don't think it would circulate through nine?

A. It will circulate through five better than it will nine.

Q. I want a Yes or No answer.

A. That is the only answer I can give.

Q. Do you think it would circulate through nine tiers?
A. I think it would circulate through five.
Q. I want a Yes or No answer.
A. I am saying five.
Q. Will it circulate through nine tiers?

The Court: The question has been answered and you can ask him another question.

Q. I understand you to say it would circulate through five, but I am now asking you whether it would circulate through nine?
A. You asked me once before.
Q. I asked you whether it would circulate through five and not through nine?
A. I said it would circulate better through five than through nine.

The Court: It is the only answer that any witness could make to such a question.
Mr. Loomis: But for the record I would like to have it clear.

[fol. 212] Q. What I want an answer to is this—Yes or No——

The Court: I will not direct him to answer such a question Yes or No.
Exception.

Q. Can you answer Yes or No whether with the crates of onions stowed head and head, nine tiers, with dunnage underneath, air would circulate through nine tiers?
A. I am saying I don't know; five would do.

The Court: We all know there is some circulation; it is absolutely absurd to ask such a question.

Q. You don't know whether it would circulate through nine?
A. I know there is some that gets through, but not as much as through five.
Q. And you would have more through two or three?
A. Absolutely.
Q. And still less through fifteen?
A. Exactly.

Q. If the crates are stowed as I understand the testimony in this case the crates were stowed, one tier would be fore and aft and the other athwartships?

A. It wouldn't make any difference which way it was, the dunnage would be just the same.

Q. I understood you to say that your dunnage boards would have to run the same way as the crates were stowed, if they were stowed fore and aft the dunnage would run that way?

The Court: I think he said just the opposite.

Mr. Loomis: I want to bring out—the evidence in the case is, as I recall, that taking——

[fol. 213] The Court: One line was stowed fore and aft and the other athwartships.

A. If the line was athwartship I would put another line of dunnage to stow that and make the air better.

Q. You would have then, I understand, lines of dunnage——

A. Absolutely.

Q. —lines of dunnage—18 or 20 of them running fore and aft and 18 or 20 running athwartships?

A. Yes, if the cargo was stowed opposite.

Q. Well it seems to me that in that situation, with six inch ties, you would practically have the bottom of your hold covered up solidly?

A. It wouldn't make any difference to me if I could carry the cargo.

Q. It wouldn't make any difference to you whether you had any ventilation?

A. It wouldn't make any difference to me how much dunnage I had.

Q. You say it would make no difference to you how much dnnnage you had down there, whether you had the floor covered or not?

A. I would have sufficient dunnage to hold my cargo up from the floor and it wouldn't make any difference to me how much dunnage it took.

Q. The extent of the air space is so important?

A. It renders the air space.

Q. But if you have these lines of dunnage, 18 or 20, running fore and aft, and between each of them blocks running athwartship, 18 or 20 of them, you certainly wouldn't have much air space?

A. Doesn't it make the air come out different ways?
Q. I don't know, you are testifying.
A. I am saying it does.
[fol. 214] Q. I can't see how it does.
A. Air is seeking——

The Court: Go on to something else please.

Q. If you anticipate storms at night at sea do you mean to say you would leave your ventilators open?
A. Yes, I would leave them open for the officer of the deck to fix them before it came.
Q. Suppose you were the officer of the deck and you anticipated a storm, would you close them?
A. The captain is never the officer of the deck.
Q. Suppose you were officer of the deck, would you close them?
A. I would certainly close them if in my opinion the weather called for it.
Q. You wouldn't wait till the water had entered the ventilators, would you?
A. Oh, no, no.
Q. You would try to be beforehand about it and close them before the water came in?
A. We can always turn the ventilators away from the wind at any time, put the covers on.
Q. Would you wait until the water had entered, or close them before?

The Court: Why should you ask him such a question as that?

Q. You would close them when you anticipated the coming of heavy weather?
A. I would close them before I got any order down below.
Q. How long would it take to close the ventilators?
A. Not very long, they are built up on stilts.
Q. Did you ever see the Vallescura?
A. No.
Q. You don't know what her ventilators are like?
A. No.
[fol. 215] Q. You don't know what they are like?
A. No, if I didn't see her I couldn't.
Q. You don't know what they are like?
A. No.

Q. You don't know how much ventilation they would afford in the hold?

A. I haven't got the size of them.

Q. Therefore you can't say without knowing the ventilation which the ventilators of the Vallescura provided—you can't say whether the cargo in her cargo holds had or had not sufficient ventilation?

A. I am not saying anything about that.

Mr. Joffe: That is our rebuttal, if the Court please.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Depositions taken on behalf of the libellants at the office of Messrs. Joffe & Joffe, 141 Broadway, New York City, on September 14, 1926.

[fol. 216] Appearances:

Messrs. Joffe & Joffe (Mr. Louis Joffe) for Libellants.

Messrs. Loomis & Ruebush (Mr. Homer L. Loomis), for Respondent and Claimant.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable, if any.

COLLOQUY

Mr. Loomis: I wish to state upon the record that I observe that a number of interrogatories attached to the answer have never been answered. I feel that for the purpose of my cross examination of this witness, it is necessary that I should have answers to those interrogatories at this time, and therefore, I would call upon counsel for the libellants to furnish me with the substance of the answers called for by those interrogatories.

Mr. Joffe: This is the first I have heard of any objection or request of this kind being made at the examination of the witness though the examination was set a week ago and adjourned at the request of Mr. Loomis. It is also my understanding that exceptions to the interrogatories have

been filed and that they have not been argued because both parties have adjourned the argument, on the exceptions to the interrogatories. I personally have not seen either the interrogatories or the exceptions. Mr. Naftalison of this office, who handled the matter while I was in Washington is now in Europe and will not return for about three [fol. 217] weeks. If Mr. Loomis will be good enough to point out what interrogatories he deems essential to his cross examination of this witness at the time the cross examination will commence, I will do my best to take up the matter at that time.

Mr. Loomis: I wish to correct what must have been an inadvertent statement of counsel for the libellants. I have not, and according to my information, no one of my firm has adjourned or agreed to any adjournment of any argument of the exceptions to the interrogatories. I would say further, that while it is true that exceptions have been filed with respect to those interrogatories, the interrogatories do remain unanswered, and if the exceptions are not well taken, we certainly are entitled to have the interrogatories answered at this time in advance of the cross examination, and if they are not so answered, and we are in fact entitled to have them answered, I shall have to move the Court in case it hereafter seems advisable, to suppress the deposition of this witness. Counsel for the libellants invited me to point out the interrogatories that I should like particularly to have answered at this time. From what he said, however, I gather that his invitation applies to a time following his examination in chief and immediately preceding my cross examination. Am I correct?

Mr. Joffe: I will give it to you now if you request it now. As I understood it you requested it prior to your examination.

Mr. Loomis: Precisely. And if I should prefer to point them out now, has counsel for the libellants any objection?

Mr. Joffe: Counsel for the libellants has no objection to [fol. 218] answer any interrogatories if he is able to, if made in good faith at this time.

Mr. Loomis: I do not fancy that expression "in good faith". Everything that I have stated, and everything that I will state here has been and will be made in the best of faith and I think that expression has no place in this proceeding.

Mr. Joffe: I did not mean to reflect on Mr. Loomis' good faith, but on what I deemed was necessary to a proper cross examination.

Mr. Loomis: The interrogatories that I should particularly like to have answered at this time, on the assumption that the witness will testify regarding events occurring on the other side of the water, at and prior to the time of shipment.

Mr. Joffe: At and prior to the time of shipment?

Mr. Loomis: Are "9" which reads State (a) the kind of alleged onions and (b) their grade. "10" State the invoice value of each crate separately. "11" State the invoice value of each half case separately. "12" Attach to your answers to these interrogatories, true copies of the consular invoice of the cargo in question together with the shipments, declaration of value before the Consul, also the consular certificate of the value (in dollars of the United States of America) of the currency in use at the ports of shipment at the time of shipment. "16" Were the onions in question put into crates and half cases at the ports of Gandia and Denia respectively. "17" If not, state where they were crated. "18" State how far, in English miles, it is from the place where the said onions were put into crates and half cases to the piers where the same were loaded on to the steamship "Vallescura". "19" Were the [fol. 219] said onions put into crates and half cases while the same were in the possession of the carrier or the carrier's agents at the ports of Gandia and Denia respectively. "20" If not, how long prior to the time they were delivered to the carrier for shipment were they put into the crates and half cases respectively? The preceding are the interrogatories that I should particularly desire answers for at this time, although I feel that I am entitled to have the other interrogatories answered at this time, because it may be quite possible that I will prove that they also, if answered, would have a material bearing on the cross examination of this witness.

Mr. Joffe: If there are any other interrogatories Mr. Loomis wishes to have answered, I would like him to read them now so that I can answer them to the best of my ability.

Mr. Loomis: The other interrogatories to which I have just referred, are by number, 1 to 8 inclusive, and 13 to 15 inclusive.

Mr. Joffe: Have you omitted any of the interrogatories whatever?

Mr. Loomis: I think not.

Mr. Joffe: If the stenographer will read each one separately I will try to answer the interrogatories. It is requested that Mr. Loomis listen carefully to my answers and if any are, in any particular, not complete I wish to be so informed so that no technical advantage will be taken if the testimony is had to suppress this deposition. As we have not the power of the court to pass upon the sufficiency of these answers, this request is made. Now, will the stenographer read each interrogatory?

[fol. 220] 1. (b) There were thirteen crates short. Note) This is all that is necessary for the cross examination of this witness.

Mr. Loomis: Due to the invitation extended to me to object to the sufficiency of the answers, I will object to counsel's failure to answer "a" and "c" of interrogatory number one.

Mr. Joffe: In reply thereto, I wish to state that I will not, at this time, go through my papers to make out an itemized statement.

2. (b) None.

Mr. Loomis: Same objection.
Mr. Joffe: Same remark.

As to 3, no answer.

Mr. Loomis: Same objection.
Mr. Joffe: Same remark.

As to 4, no answer.

Mr. Loomis: Same objection.
Mr. Joffe: Same comment.

As to 5, no answer.

Mr. Loomis: Same objection.
Mr. Joffe: Same comment.

6th. No answer.

Mr. Loomis: Same objection.
Mr. Joffe: Same comment.

7. Shortage mark it is believed is Bautista Monton.

Mr. Loomis: Same objection, and in addition I ask for the numbers of the respective crates, if they had numbers, in addition to the mark just given.

Mr. Joffe: Same comment, and in reply to the additional request, wish to state that the interrogatory states "mark or number" and the mark is given, but the numbers are [fol. 221] either 50 or 72, I don't know which. It only reflects as to the size of the crate.

Mr. Loomis: Objection previously noted still stands.

Mr. Joffe: Eighth—same answer.

Mr. Loomis: I particularly press my objection with respect to "8", pointing out that we have here a witness who presumably shipped the onions, and therefore, it becomes extremely material to know the kind of damage alleged to be suffered, and that he may be asked particularly as to causes and conditions that might be apt to produce the particular kinds of damage alleged and complained of.

Mr. Joffe: As I stated, I am not prepared at this time, to give details, so that if Mr. Loomis wishes to get that information he will kindly cross examine in detail upon each and every one of his requests from a to o as though that were the nature of the damage. It is quite obvious that it is impractical to deal with such an illogical negative.

Mr. Loomis: The kinds of damage that the libellant may be complaining of are legion and I certainly do not propose to cross examine this witness in respect to all conceivable causes or all conceivable damage. I am entitled to know the kind of damage the libellant suffered. The libellant knows and must know the kind of damage, and certainly I feel that I am entitled to know at this time, in order to cross examine intelligently, the shipper of the onions.

Mr. Joffe: I have looked through the papers I have on this matter, and I find nothing in them which enables me to answer that question in detail. As I said before, Mr. [fol. 222] Naftalison, who handled this case up to this time is now in Europe.

Mr. Loomis: I then suggest that the hearing and examination of this witness be adjourned for a time, if it is impracticable to adjourn it until the lawyer returns that has been handling the case, and until such time as the counsel now appearing in that capacity shall have had an opportunity to determine the nature of the damage complained

of. I think it must be obvious to all concerned that it will require no great effort on the part of counsel to inform himself as to the damage the libellant has been complaining of since December, 1925. If the libellant does not know at this time, certainly the libellant never can.

Mr. Joffe: As to nine. (a) kind—Denia Grano onions. (b) There is but one grade. They differ, however, in size, some being 50s and some being 72s, that is, 50 onions to a crate on one hand, and 72 onions in a case on the other, the crates being one standard size.

Ten. Invoice value of the crate the shipper believes to be about 70¢ a crate. The actual invoices are not now in possession of counsel.

Mr. Loomis: I should like it made clear whether this invoice price includes freight and commissions and if so, I should like it to appear how much the freight and commissions were in respect to each crate.

Mr. Joffe: Though not strictly in the requested interrogatory, answer will be made to the effect that the invoice included freight and commissions, both.

Mr. Loomis: I must object to the form of the answer and the substance of the answer, unless the amounts of such [fol. 223] freight and commissions in the case of each individual crate is specified.

Mr. Joffe: The freight as about 1.25, but there is a tax that must be paid to the Steamship Company which brings the freight up to about 1.35 pesetas.

Mr. Loomis: It appears from the answer that 1.35 is in pesetas. Is the 70¢ that you spoke about, is that pesetas also?

Mr. Joffe: 70¢ is 70¢ in American money.

Mr. Loomis: How much would the 1.35 pesetas be in American money?

Mr. Joffe: I don't know the rate of exchange on pesetas at that time. That is a fixed matter, and can be determined without controversy at any time.

As to Eleven:

Mr. Loomis: What is the invoice value, not the consular statement to Mr. Schnell? What was the invoice value to Mr. Schnell?

Mr. Joffe: About $1.10. Mr. Monton, upon whose information I rely, says he does not recall exactly.

As to Twelve (a) I have no copies of the consular invoice at this time. There is undoubtedly one on file at the Custom House. (b) It is believed, on information given by Mr. Monton that the declaration of value before the consul was three pesetas which does not include freight. No copy of the consular invoice is in the possession of counsel, so that he cannot answer the question about the consular certificate of the value in dollars of the currency in use at the port.

Mr. Loomis: I want to make the same objection in regard to that answer as insufficient, and not containing an [fol. 224] answer to all the questions involved in that interrogatory.

Mr. Joffe: In what respect has there been a failure to answer the interrogatory? I will try to answer.

Mr. Loomis: No true copy of the consular invoice has been supplied, no true copy of shipper's declaration of value before the consul has been supplied, nor has the consular certificate of value of currency in use at the port of shipment converted into dollars of the United States of America been supplied.

Mr. Joffe: The Company's invoice is on file at the Custom House and cannot be produced at this time.

Thirteenth: No answer.

Mr. Loomis: I wish to note particularly at this time, an objection to the counsel for the libellant's failure to answer Thirteen, inasmuch as that fact must be obviously within the knowledge of his client and very easily ascertained.

Mr. Joffe: I wish to state that I have no desire to answer questions of this kind at this time.

Mr. Loomis: I insist upon my objection.

Mr. Joffe: Same comment.

Mr. Loomis: I make the same objection in regard to failure of counsel to answer interrogatory fourteen.

Mr. Joffe: Same reply.

Mr. Loomis: I make the same objection as to interrogatory fifteen.

Mr. Joffe: Same reply.

As to interrogatory sixteen.

The crates and half cases shipped in the warehouses at Gandia and Denia were placed in the crates and half cases at Gandia and Denia.

[fol. 225] Seventeenth: Already answered in Sixteen.

Eighteen: In Gandia, the warehouses where the onions were crated and half cased are a mile and a half from the pier where they were loaded, in Gandia. In Denia, the warehouses where the said onions were crated and half cased are 300 yards from the pier at Denia where they were loaded.

Mr. Loomis: Where was the vessel loaded?

Mr. Joffe: Although not within the interrogatories, I will state that the vessel was not loaded from the pier, but was loaded about a mile and a half out from the pier in the water, and in Denia about the same distance.

Nineteen: After Mr. Loomis has cleared up what he means by the question, I wish to state that the onions were put into crates and half cases before they were delivered to the carrier.

Twenty: About two days prior to the delivery to the carrier.

Mr. Loomis: At the conclusion of the statement of counsel for the libellant, I wish to argue my objection as specifically stated following the answer or refusal to answer each particular interrogatory.

Bautista Monton, being duly sworn and examined as a witness, testifies as follows:

Direct examination.

By Mr. Joffe:

Q. What is your address?
A. Denia, Spain.
Q. Do you expect to return there?
A. Yes, sir.
[fol. 226] Q. How soon?
A. About 15 or 20 days.
Q. And when do you expect to return?
A. I do not know.
Q. What is your occupation?
A. Fruit business.
Q. How long have you been engaged in the fruit business?

A. About twenty or twenty-one years.

Q. Does your fruit business have to do with onions which we call vegetables?

A. Yes.

Q. How long have you been dealing with onions?

A. About the same time.

Q. In your dealings, have you made shipments from Denia and Gandia?

A. Yes, sir.

Q. About how long?

A. The same time.

Q. Same time what?

A. About twenty-one years.

Q. And during that period what phases of the shipments of the onions have you had to do with?

A. I have been shipper. Buying and selling.

Q. I mean what part of the shipping?

Mr. Loomis: I object to the leading question.

A. I received them to examine them.

Mr. Loomis: I move that the answer be stricken out as not responsive.

Q. What have you to do with the shipments when you make them to the United States?

A. I have to look at the proper shipping, see the crates at the quay and look at the crates if they are all right, and see that they are being shipped into the lighters properly and all that.

Q. You have been called here to testify in the case of Harry Schnell and Samuel Schnell, co-partners, doing [fol. 227] business as H. Schnell & Co., against the steamship "Vallescura", her engines, boilers, apparel and furniture, and against all persons intervening, in a cause of action arising out of a shipment of 16,043 crates of onions made by Bautista Monton & Co. to the order of the Chatham & Phoenix National Bank, these crates being marked Bautista Monton, Brines and Jose Roman, and 766 half cases marked Bautista Monton, both at Gandia, Spain, and a shipment of 8,957 crates of onions, marked Bautista Monton Superior Onions at Denia, Spain, and a shipment of 433 crates and 66 half cases marked Bautista Monton at Denia, Spain, all on the steamship "Vallescura". Do you know anything about that matter?

A. Yes, sir.

Q. What did you have to do with that shipment?

A. I was the seller and shipper of it.

Q. Did you ever examine the onions that were shipped on the "Vallescura"?

A. Yes, sir.

Q. When did you first see the onions?

A. I saw them first in the warehouses where we bought them and where we packed them, putting them into crates and boxes.

Q. State in detail how you saw the onions, how they came into the warehouse, what you did and what you saw.

A. Well, from the time that we had to buy them, we had to receive the onions, the carts came to the warehouse, we weighed the onions for the weight of them and then we entered them into the warehouse where they were classified into sizes and after that they are put into the crates in the proper crates and boxes.

Q. You do not grow your own onions, I am to understand?

A. No, sir.

Q. And you buy them at the warehouse where they are delivered?

A. Yes, sir.

[fol. 228] Q. What examination do you make, if any, at the time you purchase them?

A. They are brought in baskets and we take these baskets and change the onions to a place. From the basket we put them into a pile so that we can see them thoroughly.

Q. What did you see happened to the onions after they were in the pile?

A. They were then selected into sizes and carefully chosen so that those that are bad are taken away immediately and then they are put into the crates in the usual way and at the time of shipment they are put into carts and sent to the quay.

Q. What happened to these onions after they were put into crates and half cases at Gandia?

A. They were sent to the quay and they were shipped.

Q. How were they sent to the quay?

A. In carts.

Q. Did you see the carts go from the warehouse to the quay?

A. Of course.

Q. What sort of a day was it?

A. It was nice weather then.

Q. When the onions arrived at the quay what happened?

A. They stayed there until the steamer came. The steamer came after two days at Gandia and they were shipped into the lighters, and from these lighters on to the steamer.

Q. Did you see them pile the crates and half cases on the pier at Gandia?

A. Yes, I saw some of them.

Q. What sort of a pier is it?

A. It is a covered pier.

Q. What sort of weather was it when it was piled on the quay?

A. It was good weather.

[fol. 229] Q. How were they piled on the quay?

A. They put one crate on top of the other and make blocks of two crates so that the air may go through the fruit and you may see them all.

Q. Did you see the onions on the quay?

A. Of course.

Q. How long did you see them?

A. I was looking at them all the time they were being shipped because it is the best way.

Q. How did you look at the onions while they were at the quay?

A. I looked at them while they were in the piles.

Q. How did you look at them?

A. I looked at them going through the piles, looking at the crates, looking at the onions, looking at the brands, counting them, as is usual.

Q. What happened to the onions after they were on the pier?

A. After they were on the pier they were shipped into lighters.

Q. How are they shipped into lighters?

A. Well, the lighter gets to the side of the pier and the workers get the crates in their hands and give them to the sailors on the lighters and in that way they load the lighter.

Q. Did you see them loading into the lighters?

A. Of course, I did.

Q. What did you see after the crates and half cases were loaded into the lighters?

A. Well, the lighters went to the ship. They loaded there on the ship.

Q. What sort of a day was it?

A. It was a nice day, otherwise they could not ship.

Mr. Loomis: I move to have stricken out the expression "otherwise they could not ship".

[fol. 230] Q. Did you see the lighters return?

A. Yes, sir.

Q. Did you see any crates on them?

A. No, sir.

Q. Did you obtain any document of any kind showing that you had delivered these crates and half cases at Gandia to the Steamship Company?

A. Of course.

Q. What did you receive?

A. Well, I received the receipts on board and in exchange of those receipts on board, then I got the bills of lading.

Q. Where did you receive the bills of lading?

A. In the agent's office.

Q. I show you two bills of lading of the Lloyd Mediterraneo, stating that they received, in apparent good order and condition, by Bautista Monton at Gandia on board the steamship "Vallescura" 16,043 crates of onions, marked Bautista Monton, Brines, and Jose Roman and 766 half cases marked Bautista Monton, and ask you if you ever saw these documents before.

Mr. Loomis: I object to counsel's stating what the papers contain or show, the same not being in evidence and even if they were in evidence, the same speaking for themselves.

Mr. Joffe: The only purpose of describing in the few words the bills of lading was to identify them in the testimony so that one reading the testimony would know what document was offered to the witness for identification.

A. Yes.

Q. Where did you see these documents the first time?

A. In Gandia.

[fol. 231] Q. Where in Gandia?

A. In the agent's office.

Q. Agent of whom?

A. Of the Lloyd Mediterraneo.

Mr. Loomis: I object to the question, and ask that the answer be stricken out on the ground that it would be obvious that this witness cannot testify as to the agency of anyone in Gandia, of someone other than himself.

Q. How did you obtain these bills of lading?

A. I gave the receipts on board I had and then I paid the freight and then I got these bills of lading.

Q. Did the person who gave you these bills of lading take the receipts and the freight?

A. Yes.

Q. And did the vessel call after you made arrangements for the shipment of these onions?

A. Yes, sir.

Q. Did you receive these bills of lading after or before the onions had been placed on board?

A. After.

Q. What did you do with these bills of lading?

A. I just endorsed them following the orders I had. Some of them were extended to the order of the Chatham Bank and the others were endorsed to Mr. Schnell.

Q. Which was the one which you sent to the Chatham & Phoenix National Bank? The one that bears the statement to the order of the Chatham & Phoenix National Bank?

A. Yes.

Q. And did you send the bill of lading alone to the Chatham & Phoenix National Bank?

A. No, sir. I sent it in this way: I sent it together with [fol. 232] such necessary documents as the invoice, consular certificate, draft to the Royal Bank in Barcelona and this bank had to send them to the Chatham & Phoenix National Bank.

Q. And the other bill of lading?

A. I simply endorsed the other to Mr. Schnell with the draft and the consular invoice.

Q. That is your endorsement on the back of that bill of lading?

A. Yes, sir.

Mr. Joffe: I offer the other two bills of lading in evidence.

Mr. Loomis: Subject to verification, I have no objection to the admission of those two bills of lading. By subject to verification, I mean that I will verify if they are the real bills of lading and authentic.

(Marked Libellant's Exhibits "A" and "B".)

Q. I show you Libellant's Exhibit "A" and ask you if that is the signature on the bottom where it states that the Master received on board—Melchor Roman Adrover. That signature is the signature of Mr. Roman?

A. No, that is not the signature of Mr. Roman. It is the signature of his manager.

Q. What is the name of his manager?

A. Enrique Lancho.

Q. I show you Libellant's Exhibit "B", bill of lading #5, and ask you to tell me whose signature it is on the bottom where it says that the Master received on board—Melchor Roman, by?

A. Enrique Lancho, the same man.

Q. Is Mr. Lancho the gentleman you dealt with throughout?

A. No, sir.

[fol. 233] Q. Who is the man you dealt with?

A. Melchor Roman.

Q. As to these onions at Gandia, what did they look like?

A. They looked sound, bright in color, well matured and good. As usual they were fitted to stand the journey to the United States.

Mr. Loomis: I want to move to strike out the last half of the question reading "and good. As usual they were fitted to stand the journey to the United States" as not responsive and particularly as expressing a conclusion and a mere opinion.

Q. Did you see how the onions were packed in the crates and half cases?

A. Yes.

Q. How were they packed?

A. As usual, one on the top of the next, so that there may be always good ventilation between the onions.

Mr. Loomis: I object to the last half of that question, and ask that "so as to allow good ventilation" be stricken out. I don't object to this witness telling us what he saw and what he did, but we ought to eliminate the expression of his own opinion as to what would happen in the future.

Q. Did you see the containers?

A. Yes, sir.

Q. Describe them in detail.

A. Well, the containers are boxes made out in two depths and each division is closed with pieces of timber about three inches wide and between this timber, it is left a space of about two inches for the same purpose.

[fol. 234] Q. Can you see the onions through this space?

A. Of course, you can see them all.

Q. From your experience as a shipper of onions what is your opinion of the condition of the onions, the package, the manner of packing for shipment to the United States?

A. My opinion is that they were all good enough for that.

Q. I want your opinion on each phase of the condition of the package and packing.

A. My opinion was that the packages were good and the packing was good, too.

Q. And the onions?

A. Of course, the onions were good.

Q. How can you tell a good from a bad onion?

A. By the look of it and also by the smell.

Q. How does it look if it is bad?

A. It looks black spotted and rather soft. It is easy to see.

Q. And how does it smell?

A. Very bad. Very strong.

Q. What sort of timber were these boxes made of?

A. Spanish White Pine.

Q. What was the color of it?

A. White, of course.

Q. Did you see any blemishes on any of the crates and half cases?

A. No, sir.

Q. Any marks other than the marks of the shipment?

A. No, sir.

Q. Now, coming to Denia, when did you first see the onions that were at Denia?

A. In the warehouses.

Q. And what was your observation there?

A. I saw the onions when they were being brought in the warehouse and while they were in the piles being selected, in sizes and then being packed in crates or boxes.

[fol. 235] Q. What else did you see in Denia?

A. I saw them at the quay.

Q. Did you see them go from the warehouse to the quay?
A. Yes, sir. I saw them at the quay.
Q. What kind of a quay is it?
A. Denia?
Q. Yes.
A. There is part of it covered.
Q. Where were the onions?
A. The onions were not on the quay in Denia. They were only the necessary time to be taken from the cart to the lighters.
Q. What exactly occurred when the carts arrived at the quay?
A. They went as near as possible, and the men took the crates from the carts and just handed them to the lighters.
Q. What sort of a day was it when they were taken from the warehouse to the quay?
A. Nice day.
Q. And did you see them while they were being taken from the carts into the lighters?
A. Yes, sir.
Q. And what did you see after that?
A. I saw the lighters going.
Q. Did you see the lighters return?
A. Of course.
Q. Did they bring back any onions?
A. No, sir.
Q. Did you receive any documents from the steamship?
A. Yes, sir.
Q. What documents did you receive?
A. The receipt on board, and then I gave the receipt on board and got the bills of lading.
Q. I show you two bills of lading, one numbered "9" and one numbered "10" of the Lloyd Mediterraneo, and ask you if you ever saw them before?
A. Yes, sir.
Q. When and where did you see them?
[fol. 236] A. I saw them the next day after shipment from Denia.
Q. You recognize the signature before the Master?
A. Yes.
Q. Whose signature is it?
A. That is Ribes.
Q. Who is Ribes?
A. The agent of the Lloyd Mediterraneo.

Mr. Loomis: I make the same objection with respect to that testimony as that given respecting the persons alleged to have been the agent of the lines at Gandia. The fact may or may not be true. Certainly this witness is not in a position to testify regarding it.

Q. Did you have any dealings with this Ribes prior to this bill of lading?

A. No, sir.

Q. You made no arrangements with him?

A. No, sir.

Q. How did you know to go to him with your receipts and freight money?

Mr. Loomis: Objection.

A. Because he was the man who advised me that the steamer was there and he was the agent when the cargo was to be received on board.

Mr. Loomis: Objection, and ask that the answer be stricken out as hearsay.

Q. And pursuant to his statement, you shipped the onions on the "Vallescura"?

A. Of course.

Mr. Joffe: I offer in evidence the two bills of lading, and [fol. 237] ask that they be marked "Libellant's Exhibits C and D", respectively.

Mr. Loomis: Subject to verification as to contents and authenticity, I have no objection.

Q. From your examination of the onions at Denia, what would you say about the onions described?

A. The onions at Denia—the same as those at Gandia. They looked sound, bright in color, well matured and good.

Q. And as to the packages?

A. The same. They looked bright, clean as they usually are in these cases.

Mr. Loomis: Object to the part of the answer which states "as they usually are in these cases".

Q. What were they made of?

A. White Spanish Pine.

Q. How were they constructed?

A. In two departments, closed with pieces of timber three inches wide, leaving a space of two inches between them.

Q. Could you see the onions between that space?

A. You can see the onions through those spaces.

Q. How were the onions packed in the packages?

A. One on top of the next.

Q. From your observation and experience, what would you say as to the condition of these onions, package, manner of packing for shipment to the United States from Denia, Spain?

A. I would say that the onions, the packages and packing were good enough to stand the journey to the United States.

[fol. 238] Mr. Loomis: Objection. And I ask that the answer be stricken out, as opinion is evidence for which proper foundation has not been made, and not competent.

Q. Have you ever purchased, examined, supervised their packing, examined them at the quay, examined them on the way to the quay, examined them being put into the lighters, on the lighters, before this shipment?

A. Yes, sir.

Q. When did you ever observe similar process before?

Mr. Loomis: Objection.

A. As often as there are shipments.

Q. And how long have you been making such shipments?

A. About 21 years.

Mr. Joffe: Mr. Monton, the following interrogatories have been put to me which I have answered with your assistance prior to your examination. I am going to put each interrogatory to you directly, for I have no other information as to what occurred on the other side than what you give me, and I wish to make sure that Mr. Loomis has all the information I have on that question.

Mr. Loomis: Objection as to the form of question.

Q. Do you know anything about the kind of alleged onions and their grade other than that answer you helped me frame before in interrogatory #9?

A. No, sir, I don't know anything else.

[fol. 239] Mr. Loomis: I suggest that you repeat to the witness just the substance of what it was that he said before. Will the stenographer in each case, without repeat-

ing in her notes the answer given to the interrogatory, read that interrogatory to the witness so that it becomes incorporated in his testimony, and ask him whether it is correct and whether he wants to add anything to it.

Mr. Joffe: On a suggestion of Mr. Loomis, the general question will be put, as Mr. Monton was present when each interrogatory was read and answered by Mr. Joffe with the assistance of Mr. Monton. Were the answers correct?

Mr. Monton: I believe that you, Mr. Joffe, misunderstood me before when talking about the different kinds of onions —referring to the #50 meant there were 50 onions in a crate and #72 meant there were 72 onions in a crate, but both crates were the same in size, and that is not correct. They are rather different in size and in shape, but they are the same weight.

Q. Have you anything further to add on the interrogatories requesting the invoices? Do you remember any more than when you assisted Mr. Joffe in answering the interrogatories?

A. No, sir.

Mr. Loomis: The first question, as I recall, was a general one relating to the interrogatories in general and after the [fol. 240] witness finished his correction in regard to the size of the crates he stated that he had something else to say. I suggest that the witness be allowed to state now what that additional statement was that he had to make.

Mr. Monton: The same onions that are known in the crates as 72s, if packed into half boxes, are named "four tiers".

Q. What is the weight of the crates, 50 or 72?

A. Twenty kilos.

Q. Were the answers that I stated all correct statements of what you told me?

A. Yes, sir.

Q. Were you in New York at the time these onions arrived?

A. No, sir.

Q. Were you here when they were delivered—discharged by the steamship company in New York?

A. No, sir.

Q. Do you know any reason why these onions or containers should arrive in New York with the result that

there was breakage, leakage, sweating, salt water, heat, decay, rain wastage, spray, frost, thaw, effect of climate, deterioration or pilferage?

Mr. Loomis: I object to that question which calls for a conclusion. It is too general and improper in form.

Mr. Joffe: I am merely asking him a question which was asked in interrogatory #8, as the claim is made that failure to have that answered by counsel hampers him in a cross examination in some way. I wish to show, beyond the shadow of a doubt that this witness knows only of the condition of the shipment at the time of shipping, and the fail- [fol. 241] ure to have that question answered at this time fully and completely, can do Mr. Loomis or his client no injury.

Mr. Loomis: Counsel is in error in stating that the same question is asked in interrogatory #8. That interrogatory is quite different.

A. I don't know anything as long as I have seen them while they were being shipped. I know no reason why they should arrive but in good condition.

Q. Do you know any reason why they should arrive in a damaged condition from whatever cause?

Mr. Loomis: I make the same objection.

A. Well, unless—that depends on the treatment on board the steamer.

Q. Well, apart from the good or bad treatment received aboard the steamer, do you know any reason why they should arrive damaged from any cause whatever?

A. No, sir.

Q. Do you claim to be the only many that knows anything about onions and their shipment to the United States?

Mr. Loomis: I object to that question as obviously incompetent, immaterial and irrelevant.

A. Of course not.

Cross-examination.

By Mr. Loomis:

Q. How old are you, Mr. Monton?

A. 41 years.

Q. You live in Denia?

A. Denia.

[fol. 242] Q. How large a City is it?

A. About 18,000 people.

Q. And how large is Gandia?

A. About the same.

Q. How far is Gandia from Denia?

A. Some 20 miles.

Q. Does Denia have a harbor, that is, separate from the main sea, or is it situated right on the sea coast?

A. Situated on the sea coast.

Q. And how is Gandia in that respect?

A. The same.

Q. What are the chief fruits that are produced in and about these two ports?

A. All sorts. Oranges, apples, pears, melons. All sorts of fruits.

Q. And in your business as fruit dealer, I suppose you deal generally in those lines of products?

A. Yes.

Q. You don't specialize in onions?

A. I specialize in onions.

Q. You do handle those other products?

A. Yes, of course we do.

Q. Are the onions that are produced at or about those two ports what are known as Spanish Onions?

A. Yes.

Q. Is there any special district in Spain where these onions are produced?

A. Yes.

Q. What is that district?

A. From Valencia to Denia.

Q. Between Valencia and Denia?

A. Yes.

Q. And about how wide is that territory?

A. About 18 miles.

Q. Does it have a name—some special name to designate it?

A. Yes. The names depend on the season.

[fol. 243] Q. I don't think you understood the question. I say, does that district have a special name?

A. The Valencian district.

Q. Do you have counties or provinces in Spain?

A. Yes. Provinces.

Q. What province is this territory in?

A. In the Province of Valencia and Allicante.

Q. And of course several districts would be involved in that territory?

A. Yes, of course.

Q. Are the Spanish onions, that you have been making a specialty of handling, produced in that territory?

A. Yes.

Q. Have your shipments of these onions been always to the United States or do you ship to other countries?

A. Sometimes they have been for England and for Canada.

Q. On the average, how many shipments do you make each year to the United States?

A. About 12. It depends on the season. About 10 or 12.

Q. What kind of a season was the season last year?

A. Yes, sir.

Q. In 1925?

A. Yes, sir.

Q. All to New York?

A. Yes, sir. To New York.

Q. What kind of a season was the season last year? How would you describe it?

A. The weather? I don't quite understand it.

Q. You stated that the number of shipments would depend on the character of the season, and my question was what kind of a season did you have last year.

A. A good season.

Q. What determines it?

A. The weather.

Q. What kind of weather had you last year?

A. Good weather.

Q. What do you mean by good weather? Dry weather?

[fol. 244] A. Sometimes we have rain in the Spring. That is good for the crops.

Q. When you get rain in April or the Spring of the year, then you consider that the season is good up to that point?

A. Yes, it is a good crop.

Q. And then you need dry weather following the month of April, do you?

A. Well, you see if in April it rains it means a good crop, because the quantity is large. The farmers can plant—can put the seeds into the ground.

Q. But if it does not rain in April, the ground is hard and it is too much trouble for the farmers to plant the onions in the ground?

A. That is it.

Q. In other words, what you mean by a good season is a season in which the farmers are induced to plant a lot of onions and a season in which the quantity of the crops will be large?

A. Yes, sir.

Q. What period of time is embraced in an onion season?

A. From the middle of June sometimes until February.

Q. The crop, you mean, is harvested between the middle of June and February?

A. Yes, sir.

Q. It is planted you say, in April, and then between April and the mid summer it is growing and then between the middle of June and the following February it is harvested?

A. Well, it is harvested between June and September.

Q. Then between the middle of September, I take it, and the middle of February, the crop is marketed, sold to wholesalers, retailers and jobbers.

A. Generally they are kept by the farmers and it is not sold unless for immediate shipment. There is no speculation on it.

[fol. 245] Q. In other words, from the end of September on up to the middle or end of February of the following year, the onions are kept by the farmers in their storehouses until sold, and as a rule are all of the onions produced between the middle of June or end of September sold by the farmers at the end of the following February?

A. Generally.

Q. Except what they want to use for themselves?

A. Of course.

Q. You were going to say something.

A. Sometimes they last till March.

Q. Is it not a fact, Mr. Monton, that the quality of the crops differ from season to season?

A. From my own experience I should not believe that. I mean to say that the onions are always sound and good

enough. Now it depends on the conditions you put the onions to keep, more or less.

Q. In other words you never, in your experience, have found the crop of any one particular season to be better in quality than the crop of any other season?

A. No, sir.

Q. If the onions of any given crop do not keep well or as well as the onions of another crop, it is because of peculiar conditions into which those onions have been placed after they have been produced?

A. Exactly.

Q. The manner of treatment that they have received after being harvested?

A. After being harvested they are usually done in the same proceeding.

Q. You mean to say they all receive the same treatment after being harvested?

A. Yes.

Q. As a usual thing?

A. Yes.

[fol. 246] Q. But whether the onions would last well or would rot early would depend largely upon the kind of treatment that they had received after being harvested?

A. After being harvested, of course. Any time after being harvested.

Q. In your business as fruit dealer, do you buy the onions direct from the farmer or do you buy them direct from some middle man or jobber?

A. No, sir, from the farmers.

Q. You buy them directly from the farmers?

A. Yes, sir. The farmers go to your house with samples and then bring the orders.

Q. And then you enter into a contract?

A. No. You never make a contract. You receive the onions at the door of the warehouse. If you like them you take them. Otherwise you do not take them.

Q. The farmer never knows whether he is going to make a sale until he gets the money?

A. Yes, sir.

Q. Do you own the warehouse in Denia and the warehouse in Gandia?

A. I own the warehouse in Denia and I have hired the warehouse in Gandia.

Q. You have it under lease?
A. Yes, sir.
Q. A yearly lease?
A. Of course. But for many years now.
Q. You have the exclusive occupation of it then?
A. Yes.
Q. That is the warehouse in Gandia?
A. Yes.
Q. You own the one in Denia?
A. Yes.
Q. Would you tell me how large the warehouse is in Denia that you own?
A. Oh! very large.
Q. Approximately its dimensions?
A. Something about 12 yards against some 40 yards.
[fol. 247] Q. 12 x 40 yards?
A. Yes.
Q. And how high is it?
A. About two stories.
Q. And how many storage rooms in it are there?
A. All open.
Q. There are no dividing walls inside?
A. No, sir.
Q. But there are two floors?
A. Yes.
Q. And you have all of the fruit that you purchase and all that you propose to sell in that warehouse from the time it is delivered to you until it is delivered by you to the purchaser?
A. Yes, sir.
Q. And so you have in that warehouse all kinds of fruit from time to time during the season when such fruits are sold and handled?
A. Yes, sir.
Q. What is the building made of? Brick?
A. Brick and stone.
Q. What is the ground floor of it made of?
A. Of brick and plaster—something like plaster.
Q. Will you describe for me your warehouse in Gandia? The one you lease.
A. It is very large. The same as the one in Denia. The only difference is that it is only one floor.
Q. How many men do you have in the warehouse at Denia taking care of it and the fruits in it in your busy season?

A. About 30 or 40 men sometimes. And the same number of women.

Q. And in Gandia?

A. The same.

Q. What is your busy season?

A. I am busy from the middle of June until January.

Q. That is the season during which the crops are being harvested and marketed?

A. Yes, sir.

Q. You have quite a large payroll on your hands?

A. No; not large.

[fol. 248] Mr. Loomis: Of course, not too large. We will assume that your profits are sufficient to pay every cost and a great deal more.

Q. How do you have that labor divided? You have a superintendent for each warehouse?

A. Of course.

Q. And then you have under him—who are the hands, in order, under your superintendent?

A. Well, you see it is difficult to understand the way we work in Spain. You have only one manager in each warehouse, but they do nothing unless I approve it and say it.

Q. They have no authority save what you specially authorize them to do in any given instance?

A. Yes, sir.

Q. Is there just one manager and all of the others under him?

A. Yes, sir. Of course.

Q. Or do you have some others?

A. No. No other grades.

Q. Well, is the manager charged with the duty of bossing or supervising the work of the others?

A. Yes.

Q. He does not actually work himself, but merely directs the others in their work?

A. Yes. Sometimes he may help a little.

Q. When you are not present he has to direct the entire work of the place?

A. No, sir. When I am not present, as in this particular case that I am here in New York, my brother takes my place and then he obeys my brother the same as me.

Q. How old is your brother?

A. About 35.

Q. Has he been with you in your 21 years' work in Spain [fol. 249] as a fruit merchant?

A. All the time. He is more in the district of the saw mill.

Q. You run a saw mill establishment also?

A. Yes.

Q. Where is that saw mill establishment located?

A. In Denia.

Q. Is it right within the city limits?

A. Yes.

Q. And what kind of lumber do you saw up?

A. Pine.

Q. Produced in Spain?

A. Yes.

Q. Are there pine forests in Denia?

A. Yes.

Q. How many men do you employ in your saw mill?

A. About 100.

Q. The timber is cut down by people that own it on their farms and they bring it to you and have it sawed up?

A. No. We buy it in sailing boats which come from Galicia in the northern part of Spain.

Q. And they come all the way around Gibraltar?

A. Yes.

Q. In sailing boats?

A. Yes.

Q. Galicia is up in the mountainous district?

A. Yes, it is.

Q. Is your saw mill operated the entire year round?

A. Yes.

Q. Do you have a manager also for the saw mill?

A. Yes. My brother is manager of the saw mill.

Q. Your brother looks after the saw mill exclusively?

A. Yes, sir.

Q. After all, you have the entire charge of both enterprises, but you let your brother attend more to the saw mill business than to the fruit business, but when you are away he attends to both?

A. Yes.

[fol. 250] Q. Just what kind of work do these 80 people employed in your warehouses in Denia and Gandia do?

A. They select the fruit, put the onions in different sizes and then they pack the onions into the packages and then

they just close the packages and then they put them in piles until the shipments and then they load the carts.

Q. When the onions arrive in the warehouse, they come in carts?

A. Yes.

Q. And they come in bulk?

A. Yes.

Q. The farmers do not bring them in crates?

A. Yes. Sort of baskets—small baskets containing about 50 pounds.

Q. How many of that sort will one farmer's cart hold?

A. Very few because the carts are not very big. 20 or 25 baskets in each cart.

Q. How do they draw those cars—by horses?

A. Yes.

Q. Or do they use mules?

A. Sometimes they use mules.

Q. And then the baskets are emptied out on to a pile in the warehouse and then your employees get to work on them and classify them as to size and also they pick out the bad onions from the lot and put into crates the good onions?

A. Yes, sir.

Q. Do you remember on what day the onions that you shipped at Denia and that you have testified to, were received at your warehouse?

A. Some of the onions were received about ten days before the arrival of the first ones.

Q. Before they were sent to the pier?

A. Yes, sir. When they were received at the warehouse.

Q. Were the onions that were sent to the Denia pier received on different days at your warehouse?

A. Yes, of course.

[fol. 251] Q. What day were the onions sent to the pier at Denia?

A. On the same day the steamer was loaded.

Q. Do you remember what day that was?

A. I could not tell you exactly.

Q. Would it be the day on which the bill of lading was dated?

A. No, sir. I cannot say exactly the day. It is a long time since.

Q. Did you not say in your testimony that you had received your Gandia bill of lading on the day after the onions were delivered at the pier?

A. Yes, sir.

By Mr. Joffe:

Q. They were delivered on board?

A. Yes, sir. The next day the onions were delivered on board.

By Mr. Loomis:

Q. Well, I understood you to say that they were sent from the pier to or toward the ship on the same date as that on which they arrived at the pier.

A. At Gandia they were loaded, but at Denia they were sent from the warehouse to the ship because they did not stay on the pier.

Q. So that it is true that at Denia you received the bills of lading on the day following that on which the onions were taken to the pier, or quay as you call it?

A. Yes.

Q. May I have, please, these bills of lading #9 and #10—Now the bills of lading for the Denia shipments, Exhibits "C" and "D" are dated 10 November, 1925. Was that the date on which you received them?

A. I must tell you, gentlemen, that the date stated on the [fol. 252] bills of lading, we, the shippers, can never be responsible, of being the exact date on which the goods are sent on board.

Q. When you received the bills of lading at Denia (Exhibits C and D) did you notice that they bore the date 10 November, 1925?

A. I do not remember very well.

Q. You don't recall whether you noticed the date that they bore?

A. No, sir.

Q. Did you read the bills of lading?

A. Of course.

Q. Would you not have recalled the fact if they had borne a date different from that on which they were received?

A. No, sir, because I would not have been surprised to find a date or two differently.

Q. Do you have any reason for concluding that the date on which you received these bills of lading was some date other than 10 November, 1925?

A. No, sir. I have no reason to believe that.

Q. It may have been 10 November?

A. Yes, sir.

Q. If the day you received them was 10 November you would say that the onions were delivered to the quay and there placed upon lighters on the preceding day, that is, 9 November?

A. Yes, of course.

Q. If the bills of lading were received on the date that they bear, then the onions were taken from your warehouse to the quay on the previous day, the 9th of November, in Denia?

A. Yes, sir.

Q. Now in Gandia, did you or did you not say how long it had been after you had delivered your onions to the pier [fol. 253] before you received the bills of lading in Gandia?

A. The onions were sent to the quay two days before the arrival of the steamer, before the steamer loaded, and I received the bills of lading at Gandia the next day of loading the steamer.

Q. In other words, you received the bills of lading three days after the onions were delivered at the pier?

A. Yes, sir.

Q. Now, the bills of lading for Gandia which are Exhibits "A" and "B" are dated 5 November, 1925. To the best of your recollection, was that the date on which you received the bills of lading?

A. I think, to my recollection, that is a more true date than the Denia bill of lading. The date of the Gandia bill of lading is more true than the Denia bill of lading.

Q. In other words, you think that the date 5 November, 1925, is probably the date on which you received the Gandia bills of lading?

A. The next day—on the 6th.

Q. In other words, you think the date on these Gandia bills of lading is one day earlier than you received them?

A. Yes, sir.

Q. And if you did receive them on the 6th of November, the onions were delivered at the pier on the 3rd of November?

Mr. Loomis: I object to the counsel stating that I am putting any words into the witness' mouth. I resent it.

I am conducting a cross examination and I do not expect counsel for the libellant to tell me how to conduct it or how not to conduct it. I was invited to attend the taking of the witness' deposition and invited to cross-examine, and [fol. 254] unles I am permitted to cross-examine in my own way I shall stop.

Mr. Joffe: No one is making suggestions except to expedite the cross examination as it is drawing close to six o'clock. I have no desire to hamper Mr. Loomis' cross examination. My suggestions are intended to be helpful. If not, I am sorry.

A. On the 3rd day of November.

Q. To the best of your recollection, the Gandia onions were delivered on the pier on the 3rd of November, 1925?

A. Yes.

Q. Did you tell me that at Denia the first of the lots of onions shipped at that port was received 10 days before they were shipped?

A. About that. One day more or less.

Q. So that if they were shipped on the 10th of November they would have arrived at your warehouse on about the last day of October or the 1st day of November.

A. If they had been shipped really on the 10th, yes.

Q. Were some of the Denia onions received on a later date at your warehouse?

A. Later date?

Q. Yes. Between the date 10 days prior to the day of shipment and the day of shipment?

A. Yes.

Q. Some of the Denia onions were received between the two dates?

A. Yes.

Q. Can you tell me on what date?

A. That is very difficult. I cannot say.

Q. Do you have any means of ascertaining on what date between the last of October and the first of November and the 10th of November, some of the Denia onions were re- [fol. 255] ceived at your warehouse?

A. No. Truly I cannot recollelct so many details.

Q. How many onions do you think, during October and November, on an average, you received at your warehouse in Denia?

A. It depends on the orders I have. If I have no orders

to ship, of course, I receive nothing. If I have some orders to do then in accordance to the orders.

Q. Now, between the middle of October and the middle of November, 1925, how many onions were you receiving on an average at your warehouse in Denia?

A. I could not say on a day's average because it is difficult.

Q. Well, approximate.

A. Approximate—I could not say.

Q. You have a warehouse in which you employ 80 men and women, and you specialize in the onion business. Now you say that your busy season is from June to January. What I am asking you is, how many onions you received on an average per day between the middle of October last or the middle of November?

A. I cannot say, exact.

Q. I want to know approximately?

A. You can say something about the equivalent to 2,000 or 3,000 crates per day.

Q. That is an approximate figure?

A. Yes.

Q. Do you ship out of your warehouse the onions that you received in it immediately or shortly after they are received, or do you sometimes keep the onions in storage in your warehouse?

A. We never keep them in storage. We never keep them more than 10 or 12 days. If they are not shipped to the United States they are shipped to England.

[fol. 256] Q. You make it a rule not to keep them in your store houses more than 10 or 20 days?

A. Yes.

Q. Why do you adopt that rule?

A. It is a rule in the firm for many years and we have means to do that. To sell them to England or the United States, or to consign them to England or to consign them to the United States.

Q. Do you feel that they would not keep for a longer time?

A. No, sir. We feel that we pay for them and we want the money back.

Q. Well, then, from the middle of October to the middle of November, 1925, how many crates of onions will you receive on a daily average at your warehouse at Gandia. About the same number?

A. No. Maybe 1500.

Q. That is an approximate figure. In other words, you handle less onions at Gandia than at Denia?

A. Yes.

Q. Now from how many different farmers were you receiving these onions between the middle of October and the middle of November, 1925 at Denia?

A. More than 200 or 300. They are small farmers.

Q. Not large in acreage?

A. No.

Q. And is the same true in Gandia?

A. Yes.

Q. What is the average acreage of an onion farmer?

A. I do not know how you measure things here. A hundred yards square is a large farm.

Q. With us that would be about 10,000 square feet. That is not very large.

A. No not very large.

Q. Well then, in these shipments, Mr. Monton, that you made from Denia and from Gandia, there were onions that [fol. 257] you had received at your warehouse from any number of different farmers, and it would be impossible for you to state now from what particular farmers you had received those particular onions?

A. It is impossible to say.

Q. Therefore, it would be impossible for you to state where these onions had been stored or how they had been stored between the time they were harvested and the time they were brought to your warehouse?

A. I know nothing about that.

Q. But you think you are sure of this fact, that they were not received at your warehouse—not delivered—before 10 or 12 days before the time you actually shipped them?

A. Of course not. Never.

Q. Were you shipping other onions at this time?

A. No, sir.

Q. Between October 15th and November 15th?

A. No. After October 25th I did not ship any more onions than these.

Q. These were the last onions that you shipped from Denia and from Gandia?

A. Yes.

Q. Why did you not ship any more onions, because the season closed?

A. Because I had a good business in oranges and I left the onion business.

Q. These orders received from Schnell & Co. were the last orders that you received for the year?

A. Yes, sir.

Q. And so you filled those orders and then completely closed down on the onion business for the year?

A. Yes, sir.

Q. When you filled these orders you had no more onions [fol. 258] in your warehouses in Denia and Gandia?

A. A little we sent to England in boxes. There was some quantity left. But it was not a considerable quantity. 200 or 300 boxes.

Q. Does a box differ from a crate?

A. Yes. A box is larger than a crate.

Q. Apart from those 2 or 300, the onions that went to fill the orders of Schnell were the last onions you had in your place?

A. Yes, sir.

Q. And you say that the last previous shipments you made of onions was on the 25th of October?

A. Yes.

Q. All were to England?

A. Yes.

Q. From both Denia and Gandia?

A. Yes.

Q. On what steamer, do you recall?

A. I don't remember. There were two or three steamers.

Q. That was a much larger shipment for Schnell?

A. Yes.

Q. This was a small shipment for Schnell?

A. No, a regular shipment.

Q. Were you making small shipments after October 25, 1925?

A. Sometimes.

Q. How many small shipments did you make between October 25th and November 15th all together?

A. I don't know.

Q. A dozen?

A. Not so many. From October 25th to November 15th three or four shipments to England.

Q. And any to America other than Schnell?

A. No. Nothing else to Schnell.

Q. Can you remember at what time between October 25th and November you made those two or three shipments to England?

A. No, sir.

Q. What was the average size of those shipments you made to England?

A. About 1,000 boxes. Equivalent to 3,000 crates.

[fol. 259] Q. And there were three or four of such shipments to England?

A. Yes.

Q. When did you first hear, Mr. Monton, from Schnell & Co. that their onions had arrived here at New York in the condition that they complained of?

A. I came here to New York this year and Mr. Schnell told me—requested me to tell anything I knew about this shipment.

Q. And when did you arrive?

A. About a month ago.

Q. You had never heard until a month ago that he had any trouble with the onions?

A. No, sir. The only thing that I remember is having received letters asking about the condition of the onions, but nothing else.

Q. Have you copies of that correspondence with you? A. No, sir.

Q. You have the correspondence all at your office at Denia?

A. Yes, sir.

Q. When did you receive the first letter from Mr. Schnell asking you to tell the condition?

A. I don't remember.

Q. Was it a long time or a short time prior to your coming here?

A. A long time.

Q. Did he complain?

A. No, sir. I did not receive a letter from Mr. Schnell. It was a Mr. Wiss, my broker.

Q. He makes all your sales in this country?

A. Yes.

Q. And he reported to you that Mr. Schnell——

A. No, sir. The only thing he said in the matter—he asked me if the condition of the goods was good.

Q. When it was shipped?

A. A very few days after it was shipped.

[fol. 260] Q. Some time in November?

A. I don't remember.

Q. And you told him it was good?

A. Of course I told him the truth.

Q. And you heard nothing more about the matter from that time until you arrived, about a month ago?

A. Yes.

Q. How are you able to remember at this time, Mr. Monton, the particular onions, the particular crates that went into this particular shipment to Schnell & Co. almost a year after the shipment was made?

A. It is very easy because when I made 10 or 12 shipments like this I can remember every one of them very well.

Q. You state that you were receiving at your warehouse about 3000 cases on an average, and at another warehouse 1500 and you were making shipments all the time, to America or England, and what I cannot understand is how a year later you can pick out any particular shipment and say that the onions of that particular shipment were good. Let me ask you this. Do you mean you can do this?

A. Yes, sir. I can remember exactly certain details of the shipment because it gives a lot of trouble.

Q. Suppose I ask you about a shipment you made to Mr. X Y Z to England, say you made it between October 15th and September 25th.

A. That is not difficult to remember.

Q. I say to you, what was the condition of the onions there? Did you see them, and what was their condition. Do you mean to say you could tell me anything and everything about those onions?

A. Yes, sir. I could.

Q. Any given shipment you made?

[fol. 261] A. Any shipment I will say that I examined the goods and that the goods were good, otherwise they would not be shipped.

Q. You would say that because it is a rule of yours never to let any onions go out unless you see them and never to ship any onions unless they are, in your judgment, good and in this case you saw the onions and that they were good?

A. In this case I remember the details because it was the last and I had to go to the quay and had to look after the shipment and I remember the details.

Q. Were these shipments the very last? I thought you said you made shipments to England.

A. The later shipments were about 200 or 300 boxes.

Q. When was that shipment made?

A. About 2 or 3 days later.

Q. On what steamer?

A. I don't remember now. There were two or three steamers loading. It is quite easy to understand, because to England we ship every day and to America we shipped from 15 to 20 days, and we remember them.

Q. Well is your memory regarding these onions any different from your memory regarding any other onions shipped by you last year?

A. Maybe it is a little different because they were the last.

Q. Otherwise it is no different?

A. Otherwise no different.

Q. In other words you don't remember anything about these onions that is different from anything you remember about any other onions you shipped.

A. The only thing I remember is that they were the last.

[fol. 262] Q. There is nothing else to differentiate this shipment from any other shipment you made last year?

A. No, sir.

Q. Mr. Monton, you don't, of course, when you go around to your warehouse to look at the onions that are received there from these small farmers, you don't actually get down on your hands and knees with your help and join in with them in assorting the onions, do you?

A. No, sir. I don't handle the onions.

Q. You hire the employees to do that work?

A. Yes, sir.

Q. And the same thing is true of the crating of the onions?

A. Yes.

Q. Your view of the onions, in other words, is just the view that you get when they are brought in and put into piles. You see if they are what you would be satisfied with and what you consider good, and then you leave the actual work of separation to the help which you have there?

A. Not quite. When I receive the onions each day I am in the warehouse; the onions come on the carts and they come to the door of the warehouse. They are discharged there from baskets and they put them in a little pile, each cart after the other.

Q. Separate piles?

A. Separate piles. And they come 4 or 5 or 6 or 10 women and select the onions. If there are any spoiled ones they just throw it away.

Q. They put it in one of these baskets and take them away?

A. Yes, sir. And then the remaining ones left are weighed.

Q. On a scale in your warehouse?

A. Exactly. And from that scale they go to the general pile, and in this general pile there are women who select [fol. 263] the sizes and as these baskets are taken to each different size—to piles of each different size—the different sizes are what we call 50s and 72s and what we call 5 tiers. 4 tiers are the same as 72s and what we call 3 tiers and what we call 6 tiers that is for English delivery. So that the piles of 72s and 50s are for America. Then they are packed.

Q. Each pile is packed in different crates?

A. And put in different piles. And of course, I must see that they are bringing them from the carts to the piles. I look at all the piles.

Q. Each one of these carts has 25 or 30 baskets.

A. Yes.

Q. These baskets contain about 60 pounds?

A. Yes.

Q. Do you examine all the baskets or one or two baskets as samples?

A. No, the pile. We look while they are being selected and all the time you are looking at the onions.

Q. You mean to say you have to be there while they are being separated?

A. Yes, sir.

Q. They do not do any separating unless you are there?

A. No. In handing the onions into the warehouse, no, sir.

Q. Were you there every day from October 25th to November 15th last year.

A. I am there all the time.

Q. How could you be at the warehouse in Denia and the warehouse in Gandia at the same time.

A. I am never in both places at the same time. I buy one day at Gandia, the next day at Denia.

Q. You alternate?

A. Sometimes I am two days at Gandia, one day at Denia. It depends on the quantity of a supply.

[fol. 264] Q. You mean that your employees are idle in Gandia while you are in Denia, and that they are idle in Denia while you are in Gandia?

A. Then they are doing the other work in the warehouse.

Q. What other work?

A. Selecting the sizes and packing.

Q. Then you did not mean to say that you were in Denia or in Gandia in the warehouses there while the onions in this case were being selected as to size or being crated?

A. No, sir. I referred the first time to the examination in receiving the onions from the farmers. Nothing else.

Q. Do you mean to say that you were in the warehouses at the time the onions were purchased and separated, selected, and the bad ones picked out from the good, and then weighed, and then you paid the farmer for them and that you did not see them until they were shipped to the pier; you did not examine them?

A. I can tell you that I examined both, although Denia and Gandia are not the same place. The onions are there, and if they are not packed and if I do not see them today I see them tomorrow.

Q. You mean to say that you were present at Denia and Gandia in the warehouses while these onions were being selected as to size and being crated?

A. I am, sometimes.

Q. You cannot say that as to these particular onions you were not present while they were being selected as to size and crated.

A. I can tell you in this particular case that I was present while they were purchased and after that, although Gandia and Denia are separated by 20 miles. I was there [fol. 265] all the time. I was sometimes in Denia in the morning and in the afternoon in Gandia.

Q. What I want to get at is that you did not mean to indicate that you were present in the Denia warehouse while

the selecting and packing was going on, or that you were present in Gandia while the selecting and packing was going on?

A. Yes, sir. I can tell you that I was present; if not always, I was present most of the time. Suppose I was in the morning at Gandia and they were selecting at Gandia and I may not see them at that moment and the onions were still in the pile or if they were still in the crates, so I could see them—if it was properly done or not. I could see the onions at all the times.

Q. Onions in a pile are not all exposed to view?

A. You can make an opinion.

Q. You understand Mr. Monton that what I am after is just to learn precisely how you proceed in your warehouses, and I understand this; that much of this work of selecting and packing and crating went on while you were present, not in the Denia warehouse but over in the Gandia warehouse, and much of the selecting and packing and crating in the Gandia warehouse went on while you were over in the Denia warehouse.

A. Yes. I understand you.

Q. Is that a fair statement of the case?

A. Of course I understand that it is quite the right thing that while I was in Gandia I could not be in Denia.

Q. And that while you were in Gandia this work was going on in Denia and while you were in Denia this work was going on in Gandia?

A. Yes.

[fol. 266] Q. When onions are in a pile, of course I don't need to be told that you cannot see the onions that are on the inside of the pile. That is true is it not?

A. No, sir. I cannot see the onions that are inside.

Q. To see them you would have to inspect those onions on the inside?

A. Yes, sir.

Q. You never did that?

A. Sometimes it was necessary because the onions were not more than 5 inches high. You may say a pile of 2 onions or 3 onions. Maybe 4 onions.

Q. I would not call that a pile.

A. We call them piles.

Q. When the onions are crated you could not see all the onions in the crate could you?

A. Yes, sir. You can see everything.

Q. Would you. Mr. Monton, insist here that after these onions in question had been crated you, at one time or another, saw every onion in every crate?

A. Yes, sir.

Q. Do you remember that you did?

A. Yes, sir.

Q. Did you ever set out with the avowed purpose of looking at every onion in every crate?

A. Yes, I did.

Q. In this particular case?

A. Yes.

Q. Do you remember that?

A. Yes. Perfectly.

Q. Is that what you do in the case of every shipment you make?

A. Sometimes.

Q. After they are crated?

A. Yes.

Q. You make it a rule to look at every onion in every crate after they are crated?

A. Yes, sir.

Mr. Joffe: Since the witness is a foreigner, I felt that [fol. 267] there might have been an incorrection in the taking of an answer to a certain question. I request that that answer be read by the stenographer about "since sometime".

Mr. Loomis: It is alright to do so. I have no objection whatever, but I do not want the original question and answer changed.

(Stenographer repeats question.)

Q. Is that what you do in the case of every shipment you make? A. Sometimes.

Mr. Joffe: I believe that your answer was something else. Will you kindly state if that is the correct answer you gave at that time?

Mr. Monton: No, sir.

Mr. Joffe: What was the word you used?

Mr. Monton: Since some time.

Mr. Joffe: That is exactly what I thought and exactly what I thought at that time.

Mr. Loomis: May I be allowed to proceed?

Mr. Joffe: By all means, proceed.

Mr. Loomis: I will start in again. Now if I may be allowed to proceed, I should like to remind Mr. Monton that according to Exhibits A and B, that is the Gandia bills of lading, there were 16,809 crates of onions and half cases of onions, or as stated in other words 16,043 crates and 766 half cases.

[fol. 268] Q. Now, how many onions would be included in that amount of crates and half cases?

A. It depends on the number of 72s and 50s.

Q. Do you remember whether they were 72s or 50s?

A. There were both included in this shipment.

Q. Do you remember whether they were used indiscriminately?

A. What do you mean?

Q. Were some of the crates and some of the half cases filled with 72s and others of the crates filled with 50s?

A. No, sir. They were all filled properly.

Q. You don't understand my question. I say, some of the crates and some of the half cases were filled with 72s and only 72s?

A. I don't know. The only thing I know is the cases were four tiers and the crates were some of them 50s and filled with 50 onions and the others 72s and filled with onions of 72s but I do not know how many there were 50s and how many there were 72s.

Q. Did you have in any case or any crate part 72s and part 50s?

A. No, sir. That cannot be.

Q. You cannot tell how many of these 16,043 crates consisted of 72s *and 50s*?

A. Yes, I can.

Q. Were all of the 766 half cases four tiers?

A. Yes.

Q. What do you mean by four tiers?

A. Four tiers in the half cases?

Q. Yes.

A. Four rows.

Q. How many onions would there be in a tier?

A. I don't know, sir.

Q. How many tiers were there in the crates?

A. Tiers? I don't know. I think about five.

[fol. 269] Q. And how many onions would there be in a row or in a tier to a crate. A. Generally six. I don't remember exactly. A crate has 72 onions and you cannot put in more nor less. You cannot put more nor less either bigger or smaller.

Q. Mr. Monton, do you mean to say that you cannot recall now how many tiers or rows there were in the crates of onions embraced in this Gandia shipment? A. I cannot tell you because I don't know how many 72s or 50s there were.

Q. Well, in any crate containing 50s how many tiers would there be?

A. About five.

Q. In 50s there would be five tiers?

A. Yes.

Q. In 72s how many tiers or rows?

A. Six.

Q. Then in the 50s there would be ten onions in a row or tier, and in the 72s there would be 12 onions in a row or tier.

A. Yes.

Q. Now in the half cases you say there would be four tiers and how many onions would there be in a row or tier in the half cases?

A. I don't know now.

Q. How many onions would there be altogether in the half case? A. Four onions, one on top of the other; in the crate there are only two, in the case there are four.

Q. In the half case there are four onions piled on top of one another?

A. Yes.

Q. Is there any wood between them?

A. Yes.

Q. Wood between each row of onions?

A. Yes. Two wooden partitions.

Q. Three compartments in a half case?

A. Yes.

Q. And in each compartment four onions are one on top of another; then in a half case there would be 12 rows of onions?

A. I cannot tell exactly, because I do not know.

[fol. 270] Q. That is as nearly as you can state?

A. Yes.

Q. Then, if there were three compartments and each

compartment contained four onions piled on top of one another, there would be 12 rows of onions in each case?

A. I don't know. I don't want to say anything I don't know exactly.

Q. Take the crates again—I understood you to say that in the crates containing 50s there would be five rows or tiers of onions. Did you mean five compartments?

A. No, sir. Only two.

Q. And in each compartment there would be five rows of onions? Five onions piled on top of one another?

A. No, sir. Two onions on top of one another and five in the length. If I could speak Spanish I could tell you. In English I cannot explain it.

Q. I want to know and I must find out in some way. You tell me that in the crates there are five tiers or rows of onions. I must find out from you, Mr. Witness. No one else can tell me. Therefore I must know—.

A. I shall be pleased to tell you if I can.

Q. Tell me if you will, please, again how many tiers or rows of onions there are in a crate containing 50s?

A. A crate is a box in which there are two onions, one on top of the other. Have you that clear? Now in one length there is five onions and in the other five more; that is 25 onions and 25 more onions underneath that is 50. Have you got it now?

Q. In other words, there are two plains of onions in the bottom plain there are five onions by five. Five wide and five long and in altitude there are two onions, so that there [fol. 271] are in all 50 onions; 25 in each plain. And that constitutes a crate?

A. Yes.

Q. There is no wooden partition between the two rows of onions?

A. No, sir. But there is a wooden partition perpendicular. On one of the sides there is room for 3 onions and on the other 2, so that there would be 10 onions on top and 10 onions underneath, that is 20 onions and on the other side there is 15 and 15.

Q. How high are these crates?

A. Two onions.

Q. About a half foot?

A. No. About 20 centimeters.

Q. About how long are the crates?

A. 48 centimeters to 50 centimeters long.

A. And how wide?

A. The same. 48 to 50 centimeters wide.

Q. Is the top of the crate solid board?

A. I don't know how to explain it. I cannot explain it because I do not know what you consider top and bottom.

Q. Does the crate have a bottom?

A. I don't know. If a crate is in this position, this would be the top and this would be the bottom.

Q. Well it has four sides and two ends, hasn't it?

A. Two ends and then you are asking for the ends and two sides.

Q. You say that it has properly no top or bottom as I understood you to say it has no top or bottom?

A. I suppose.

Q. Certainly a crate must have six sides altogether.

A. It depends on what you call a top and what you call a bottom.

Q. These six sides are made of white pine and are any of these sides made of solid wood?

A. Yes, sir.

[fol. 272] Q. How many?

A. The two tops.

Q. The top and bottom?

A. What do you mean by top and bottom?

Q. You say the two tops are solid.

A. If you call that tops, yes, sir. I cannot understand.

Q. How many of the six sides are solid?

A. Four.

Q. And two of these sides are not solid?

A. Are made of pieces of timber about three inches wide and separated, leaving a space between them of about 2½ inches.

Q. How long are those?

A. 50 centimeters long, more or less.

Q. And they are three inches wide?

A. Yes.

Q. And how many of such strips are there on the side?

A. Five on each side; that is ten.

Q. And how much of a space is there between each of these strips?

A. Two inches. Something like that.

Q. So that the side would be 25 inches high because there

are five of these five inch strips. 15 inches plus 10 inches would be 25 inches so that the sides would be 25 inches high. Now you looked through from one side to the other through these open spaces. How many rows of onions were there?

A. Two.

Q. So these open strips are on the sides containing the greater area?

A. Yes, sir.

Q. Now the half cases. You say that there are four tiers in them?

A. Yes.

Q. They also have four solid sides?

A. They have the two tops of the box solid and then all four sides they are covered with pieces different sizes but leaving two spaces on top and one space on the side.

[fol. 273] Q. That means nothing to me—what you just said. What is the dimension of a half case. How many centimeters long, wide and high?

A. I don't remember exactly. Approximately 30 centimeters square and about 80 centimeters long.

Q. That is approximate?

A. Yes.

Q. Then a half case would contain more onions than a crate?

A. A half case contains about as many onions as a crate and a half.

Q. Of 72s?

A. Yes.

Q. So that each half case would contain 108 onions. Now, do you mean to tell me that after these onions have been crated up in this way you remember that you looked at every onion in every one of those 16043 crates and 766 half cases at Gandia?

A. Yes, sir.

Q. You remember that you did?

A. Yes. I remember having inspected them very thoroughly.

D. Do you remember having inspected each onion?

A. Yes, sir.

Q. Do you remember the same thing about having ex-

amined each onion in the 8957 and 433 crates and 66 half cases shipped at Denia?

A. Yes, sir.

Q. You saw every onion you had in that shipment?

A. Yes, sir. I saw them to be sure that they were in good condition.

Q. How long did it take you to look at these hundreds of thousands of onions?

A. From the time I began buying the first onion until I shipped the last onion in this particular shipment.

Q. How long did it take you to examine them while they were crated?

A. I can do it. I can look at the onions and see them all.

[fol. 274] Q. I am not asking you whether you can.

A. I did.

Q. I am asking you how long it took you to see this entire shipment of onions, onion by onion after they were crated?

A. After they were crated? How long? While they were being shipped?

Q. In hours, state how long you were engaged in looking at these individual onions.

A. One day in Denia and one day in Gandia.

Q. Is it not quite customary then for onions to deteriorate between time of shipment and the time of arrival in New York or other destination?

A. It depends on the days the steamer takes for doing it.

Q. Does it not also somewhat depend upon the condition of the onion when shipped?

A. No, sir. I could tell you it depends not at all on that because these same onions have kept for months if kept in a proper place.

Q. Is it not true, Mr. Monton, that it depends somewhat on the previous treatment that the onion has received?

A. No, sir. Once you get the onions in the warehouse, if they are sound, they can stand a long time, two, three or four months.

Q. You would say the only event in which onions deteriorate or spoil when shipped by water, sea, is the event that the voyage is a longer one than usual.

A. I don't know. Something may happen.

Q. It depends on the manner of stowage?

A. Yes. That is what I mean.

Q. Suppose a ship is at sea in rough weather and has to keep her hatches down to prevent water coming into the

hold and the onions could not get wet, would that cause [fol. 275] them to deteriorate?

A. In my opinion, yes, sir. In my opinion I should let the water come in rather than to deprive the onions of ventilation. That is the most important.

Q. Ventilation is important for onions?

A. Yes.

Q. It is not so important for any other fruit as for onions?

A. No, sir.

Q. If onions are deprived of ventilation, for how long a time—?

A. A few days. A very few days.

Q. That is if the hatches of a ship had to be kept down for four or five days?

A. That would be sufficient.

Q. So that it is a very delicate sort of a fruit to be shipped?

A. Unless the steamship is especially fitted for it.

Q. And good weather so that it can keep the hatches open?

A. Yes, sir.

Q. You don't know anything of the weather on this trip?

A. No, sir.

Q. Or the question of the hatches being closed?

A. No, sir.

Q. Well, Mr. Monton, I think I will conclude my examination at this point. There is one other question. From where you stood on the piers or quays at Gandia and Denia, could you see the ship?

A. Yes, very easily.

Q. It was a mile and a half away?

A. Yes.

Q. Did you watch the process of loading the onions from the lighters on to the ship. You cannot say in detail, but you can see the machines from the lighter to the ship?

A. Yes.

Q. You could only see the general operation?

A. Yes.

[fol. 276] Q. You could not give any of the details?

A. No, sir.

Q. How many lighters were used in Denia?

A. About 10 or 12.

Q. At Gandia?
A. About the same.
Q. And how many trips did each lighter make at Denia?
A. About 3 or 4.
Q. And at Gandia?
A. About the same.
Q. And how many men on each lighter?
A. Usually three or four or five. They are not large lighters.
Q. From where you stood on the pier at Denia were you looking at a side of the ship or the bow of the ship or the stern of the ship?
A. Only one side.
Q. The same at Gandia?
A. Yes.
Q. Which side were you looking at at Denia?
A. The left side of the steamer.
Q. And at Gandia?
A. The right side.
Q. Did the loading of the onions from the lighters on to the ship—did they load on both sides simultaneously?
A. Yes.
Q. One half from the right side?
A. Yes. In Gandia on both sides they loaded and in Denia they took from only one side.
Q. Which side did they take from Denia, the right or the left side?
A. The left side.
Q. Was that the side next to you or the side away from you?
A. Next to me.
Q. Who owns these lighters?
A. The workers.
Q. The lighter company?
A. No, the sailors.
Q. You mean each sailor has his own lighter?
A. Not all the sailors, but there are some sailors who have lighters.
Q. And did you hire them?
A. Yes.
[fol. 277] Q. You made contracts with ten different lighter men?
A. No. They manage that themselves. You have to do

with the society of the sailors. You pay to the society and you are furnished the lighters, and you pay the society.

Q. Do you know the names of any of the sailors who own the lighters?

A. Yes.

Q. Can you give them to me now?

A. Of course.

Q. Can you name any of the sailors?

A. Yes.

Q. Name them.

A. One, Lanuza, Bordes, Mello, Ibars.

Q. These particular lightermen were employed in carrying your goods?

A. Some of them.

Q. Did they carry some of your Denia onions to the ship?

A. Yes.

Q. Do you know the names of any of the lightermen at Gandia?

A. No, sir.

Q. Now, you spoke in your direct examination about brands. These onions did not have any brands on them?

A. No. The only thing there were some other brands besides mine. There were some brands like Brines and Roman.

Q. And when you spoke of brands you meant the names of yourself or the previous owners?

A. Yes.

Q. Your broker negotiated this sale in New York to Schnell & Co.?

A. What do you mean?

Q. Made the contract. Arranged the sale.

A. Yes, sir.

Q. For all these onions for Schnell?

A. Yes.

Q. The Chatham & Phoenix National Bank came into it as a financial medium?

A. Exactly.

Q. It was known all the time that the onions were Schnell's onions?

A. Yes, sir.

[fol. 278] Q. Can you tell us how much Schnell paid you for these onions?

A. I think it is about 70¢. I am not sure.

Q. And that differs from the value you declared to the consul in the Port of Shipping which is the value in Spain and that you said was about 3 pesetas per crate and for a half case 4½ pesetas?

A. Yes.

By Mr. Joffe:

Q. These warehouses that you spoke of, have they any windows?

A. Yes, they have.

Q. What kind of windows?

A. Three rows of six windows on one side and the same on the other.

Q. Before entering into this examination, did you examine these bills of lading?

A. I saw them in Denia.

Q. No, did you see them in New York?

A. No, sir.

Q. Did you speak to anyone about this case before you testified?

A. No, sir.

Q. Did you speak to Mr. Schnell about it?

A. No. The only thing, I was requested to make a statement of everything that I knew about these onions before and after the shipping, that is the only thing I talked about.

By Mr. Loomis:

Q. Did you not tell Mr. Joffe anything about the case previously?

A. No, sir.

By Mr. Joffe:

Q. As to Exhibits C and D—take Exhibit D. To whom did you send that bill of lading?

A. To the Royal Bank of Barcelona.

[fol. 279] Q. And as to the bills of lading at Gandia?

A. I pursued the same process with the bills of lading in Gandia as I did in Denia. One I sent to the Chatham & Phoenix National Bank, with drafts, and the other was sent direct to Mr. Schnell.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Deposition of B. Dulbecco executed at Genoa, Italy, June 18, 1928, (prepared in question and answer form).

Direct Interrogatories and Answers thereto:

Q. 1. State (a) your name, (b) your address, (c) your age, (d) your occupation.

A. Bartolomeo Dulbecco; resident at Imperia I (Liguria); aged 50 years; occupation Sea Captain.

Q. 2. If you stated that you are the master of a steamer, state (a) how long you have been going to sea, (b) how long you have held a master's license.

A. Twenty-five years. Five years.

[fol. 280] Q. 3. If you have not already done so, state whether you were master of the s/s Vallescura in the months of November and December, 1925.

A. Yes.

Q. 4. State how long you were master of the s/s Vallescura.

A. About twenty months.

Q. 5. State the dimensions of the Vallescura.

A. About one hundred and twenty meters length; about twelve meters width, but I cannot say exactly as I do not remember it well; eight thousand three hundred deadweight; three thousand and seventy-two tons net registered.

Q. 6. State if she was or was not classified by Lloyd's or some other classifier, and, if so, what her classification was in 1924.

A. She was classified by Lloyd's. I do not remember.

Q. 7. State when the Vallescura was built.

A. I believe it was in 1910.

Q. 8. State when she was last inspected prior to November, 1925.

A. I do not remember.

Q. 9. Do you remember the voyage from Mediterranean ports including Gandia and Denia to New York in November, 1925?

A. I do.

Q. 10. Were any inspections made of the Vallescura just prior to taking on cargo for the Gandia-Denia-New York voyage, and, if so, describe the same?

A. There was an inspection which I made. Before the loading of the cargo I inspected all parts of the ship, the holds, the bilge at San Feliu. This was before I took on the cargo of cork for the voyage to Gandia, Denia and New York.

Q. 11. Did you inspect the steamer prior to taking on cargo for the Gandia-Denia-New York voyage?

A. I did.

Q. 12. If you did inspect the steamer, describe the condi-
[fol. 281] tion of her (a) holds, (b) decks, (c) ventilating system, (d) machinery and boilers.

A. (a) Clean and in good order; (b) in good order; (c) quite in order; (d) in good order.

Q. 13. Was any report made to you of any defect in or damage to the engines, boilers, or any other machinery on the steamer?

A. I received no such reports.

Q. 14. State (a) the date when you arrived at Gandia, (b) the date on which you left Gandia, (c) the name of the next port you stopped at.

A. (a) On the fourth of November, 1925; (b) on the fifth of November, 1925; (c) Denia.

Q. 15. If you stated that you next stopped at Denia, state (a) the date when you arrived at Denia, (b) the date on which you sailed from Denia.

A. (a) On the fifth of November, 1925; (b) on the twelfth of November, 1925.

Q. 16. What cargo was loaded on board the Vallescura at Gandia, and what amounts of such cargo?

A. Onions, dried almonds and raisin. I do not remember the exact quantities, but I believe there were about three hundred tons of onions.

Q. 17. What cargo was loaded on board the Vallescura at Denia, and what amounts of such cargo?

A. Three hundred or four hundred tons of onions. I do not remember how many tons of almonds and raisin.

Q. 18. If you stated that onions were loaded at Gandia and Denia, state (a) how many cases, half-cases and/or crates of onions were loaded at Gandia; (b) how many cases, half-cases, and/or crates of onions were loaded at Denia.

A. (a) I do not remember; (b) I do not remember.

[fol. 282] Q. 19. Did you see the cargo of onions loaded at Gandia and Denia?

A. I did.

Q. 20. State by what means the said cargo was delivered to the Vallescura at Gandia and Denia.

A. By means of derricks.

Q. 21. What is your duty in connection with the stowage of cargo?

A. To supervise the same.

Q. 22. Just what did you do in connection with the stowage of the cargo loaded at Gandia and Denia?

A. I went down to inspect the stowing of the cargo and to give orders as to how it should be placed.

Q. 23. State in what hold or holds the cargo of onions received at Gandia and Denia was stowed.

A. In holds number one, two and five.

Q. 24. What other cargo was stowed in the same hold or holds?

A. In the lower part of the same holds cork was stowed.

Q. 25. What cargo was stowed under the onions?

A. Cork.

Q. 26. What cargo was stowed on top of the onions?

A. Nothing.

Q. 27. What cargo was stowed around or beside the onions?

A. Nothing.

Q. 28. How many cases, half-cases, and/or crates were stowed in each hold?

A. I do not rememer.

Q. 29. Were they stowed over the entire space of each hold?

A. There was some space left between the onions and the upper part of the holds, but from side to side it was all filled.

Q. 30. How many tiers high were the cases, half-cases, and/or crates of onions stowed?

A. I do not remember.

Q. 31. How much room, if any, was left between the top of the onions and the deck above?

A. About four feet.

[fol. 283] Q. 32. Attach to your answers to these interrogatories a stowage plan and mark it "Claimant's Exhibit 1".

A. Attached and marked: "Claimant's Exhibit No. 1".

Q. 33. If you have not already done so, describe in detail

exactly how the onions were stowed, including a description of dunnage used, if any; the arrangement of air spaces, if any; and what method, if any, used to insure ventilation and the prevention of cargo shifting.

A. As described in Interrogatory number 29. There was no dunnage used as the cork acted as an isolator. The cargo could not shift because the holds were completely filled.

Q. 34. How many ventilators were there in each hold in which onions were stowed?

A. I think there were two in each hold.

Q. 35. Describe the location of the ventilators leading into the holds in which onions were stowed.

A. One forward and one after in each hold.

Q. 36. State the dimensions of the ventilators, stating their height, diameters, and the width of the opening at the mouth of such ventilators.

A. Nine feet above the deck and two feet diameter.

Q. 37. Were the ventilators of the same diameter at all points, and if not, state (a) their diameter at the top, (b) their diameter at the point where they empty into the hold?

A. Same dimensions in all parts.

Q. 38. Upon sailing from Gandia and Denia were the ventilators open or closed?

A. Open.

Q. 39. After leaving Gandia and Denia, were the ventilators at any time or all times closed?

A. Yes, when the weather was bad.

Q. 40. If you state that they were at any time closed, [fol. 284] state (a) the exact dates on which they were closed, (b) the length of time they were closed, (c) the reasons why they were closed.

A. (a) I do not remember; (b) I do not remember; (c) They were closed so as to avoid the water entering the holds when the weather was bad.

Q. 41. Draw a sketch of the ventilating system of the Vallescura, attach it to your answers to these interrogatories, and mark it "Claimant's Exhibit 2".

A. Unable to comply.

Q. 42. State what other means, if any, there was of access of air to the hold or holds in which the onions were stowed.

A. When the weather permitted the hatches were left open.

Q. 43. If you state there were hatches leading into the

hold or holds in which the onions were stowed, state whether they were open or closed upon sailing from Gandia and Denia.

A. Upon sailing from Gandia the hatches were open, and upon sailing from Denia they were closed because of the bad weather.

Q. 44. Were the hatches closed subsequent to sailing from Gandia and Denia?

A. They were closed.

Q. 45. If you state that they were at any time closed, state (a) the exact dates on which they were closed, (b) the length of time they were closed, (c) the reasons why they were closed.

A. (a) I do not remember; (b) I do not remember; (c) Because of bad weather.

Q. 46. How many times have you seen onions stowed in just such a manner as that described above?

A. One time before.

Q. 47. How many cargoes of onions have you carried from Mediterranean ports to American ports?

A. I went twice with a cargo of onions to Montreal and [fol. 285] the voyage in question was my only voyage to New York with a cargo of onions.

Q. 48. In view of your experience in transporting onions to American ports, would you say that the stowage and ventilation of these onions was good and proper.

A. Yes, it was a good and proper system.

Q. 49. After leaving Gandia and Denia did the s/s Vallescura stop at any other ports for bunkers or cargo, and if so at what ports?

A. Gibraltar for bunker.

Q. 50. If you state above that the s/s Vallescura stopped at Gibraltar for coal, state if it was customary for vessels at that time to coal at Gibraltar after leaving Mediterranean ports for American ports if you know and if so give the reasons therefor.

A. It is customary because it is more convenient.

Q. 51. How many trans-Atlantic trips to America had you made on the s/s Vallescura prior to the voyage in question.

A. Two to Montreal, and none to the United States.

Q. 52. On such previous trips what was the usual running time?

A. It was very variable. It required about fourteen to fifteen days from Gibraltar to Montreal.

Q. 53. Was this voyage in November, 1925, unusual in respect to the time required or was it an ordinary trip?

A. In respect to time it was unusual.

Q. 54. Describe and state the weather conditions prevailing throughout the voyage.

A. From Bermuda to New York the weather was stormy, and from Gibraltar to Bermuda the weather was variable.

[fol. 286] Q. 55. If you state that there was any severe weather, state at what locality the same occurred and for what length of time the same lasted.

A. The weather from Bermuda to New York was constantly bad.

Q. 56. State the velocity of the wind during such severe weather?

A. I cannot state the exact figures but it was very strong and the weather very heavy.

Q. 57. State if any damage was occasioned to the steamship by the storm and if any was occasioned, state and describe just what damage took place.

A. The engine was damaged.

Q. 58. State whether any water penetrated into the holds through the ventilators or hatches during the severe weather.

A. No.

Q. 59. How many trans-Atlantic voyages during the months of November and December have you made prior to this one?

A. None.

Q. 60. On any of the previous voyages did you experience weather as severe as this and if so how many times?

A. No.

Q. 61. Were the ventilators or hatches left closed or open during fair weather?

A. They were left open during fair weather, but were closed during bad weather.

Q. 62. If you say that either were left open during fair weather state if they were opened at all such times and if not why they were not?

A. They were always open during fair weather.

Q. 63. Did you make a protest at New York at the conclusion of this voyage?

A. I did.

Q. 64. If you did, attach a true copy of the same to the answers to these interrogatories and mark it "Claimant's Exhibit 3".

A. Claimant's Exhibit 3 attached.

[fol. 287] Q. 65. Have you the original logs for this voyage?

A. No, I have photographic copies of them.

Q. 66. Are these logs in your own handwriting and did you make them?

A. The original was made in my own handwriting by myself.

Q. 67. If you have the original logs attach them to the depositions and have them forwarded to the Court.

A. I have not the orginial.

Q. 68. If you have not the originals have you a photostatic copy of the same?

A. I have.

Q. 69. If you have, attach it to the answers to these interrogatories and mark it "Claimant's Exhibit 4".

A. Claimant's Exhibit No. 4, attached.

Q. 70. Did you see the onions after the arrival of the ship at New York?

A. I did.

Q. 71. If so, what were their condition at that time?

A. Good.

Cross-Interrogatories and Answers thereto:

X Q. 1. State on how many different voyages you have carried onions from Spain to New York (a) before December, 1925, (b) after December, 1925.

A. On one occasion only, in December, 1925.

X. Q. 2. Give the dates of the beginning and end of each of these voyages, the name of the vessel in each instance, the exact places of stowage of the onions, and the number of crates, half cases and/or cases.

A. November 16, 1925, arriving at New York on December 5, 1925, in the steamship Vallescura. The onions were stowed in holds Nos. 1, 2, and 5. I do not remember the number of crates or cases.

X Q. 3. State in detail the manner of stowage of each [fol. 288] cargo of onions you have carried.

A. They were well stowed in the usual way.

X Q. 4. State what brings to your mind the shipment of onions carried by you on the s/s Vallescura in November and December, 1925, so that you are able to testify after a period of two years, as to all the details of amounts, stowage and other facts upon which you testified.

A. Only from memory and reference to the log.

X Q. 5. State whether or not at the time you examined the onions, their receipt on board, the stowage, care, and the discharge on the s/s Vallescura, in November-December, 1925, you made notes as to your examination.

A. I only made out the usual receipt.

X Q. 6. If your answer to the fifth interrogatory is in the affirmative, please hand the notes to the Commissioner and request him to mark them as exhibits.

A. I made no notes.

X Q. 7. If you did not make any notes, explain how you are able to testify at this date as to receipt, manner of stowage, opening of hatches and discharge of the onions on the Vallescura in November-December, 1925.

A. From memory and the log.

X Q. 8. If you do produce any notes, memoranda and papers in answer to the sixth interrogatory, state whether these notes, memoranda and papers are in your handwriting?

A. I made no notes.

X Q. 9. State what the net tonnage of the s/s Vallescura was in November, 1925.

A. 3072 net tons.

X Q. 10. Describe the vessel as to compartments and state the dimensions of each compartment. Draw a diagram of the ship to assist us and hand it to the Commissioner and request him to mark it as an exhibit.

[fol. 289] A. Exhibit attached describing the stowage of the onions.

X Q. 11. State (a) whether the s/s Vallescura in November, 1925, was an 8, 9, 10, 11 or 12 knot vessel, (b) number of nautical miles per hour the vessel was known or marked for or usually made.

A. (a) Nine knots an hour; (b) Nine nautical miles per hour.

X Q. 12. State the maximum draft of the s/s Vallescura in November, 1925.

A. I do not remember.

X Q. 13. State the summer and the winter free-board of the s/s Vallescura in November, 1925.

A. I do not remember but it was very much.

X Q. 14. State the draft forward, aft and "mean" of the S. S. Vallescura when she left (a) Gandia, (b) Denia, (c) Gibraltar.

A. I do not remember.

X Q. 15. State whether or not you expected to be almost continuously awash on this voyage from Spain to New York in November-December, 1925.

A. Yes, I did.

X Q. 16. State whether or not you expected the vessel to pitch, roll and ship water practically continuously on this voyage from Spain to New York in November-December, 1925.

A. Yes, I did expect it.

X Q. 17. Did you safely meet and weather the storms which you encountered on the voyage from Spain to New York in November-December, 1925?

A. I did.

X Q. 18. State in detail as to each storm encountered: (a) Beaufort Scale reading; (b) the number of lives lost; (c) the number of masts carried away; (d) the number of "bridges" carried away; (e) the amount of deck cargo carried away; (f) the number of ventilators carried away; [fol. 290] (g) the number of hatches carried away; (h) the other damage done in detail.

A. I do not remember but the conditions are described in the log.

X Q. 19. Was each item of damage done by the storm to the vessel noted in the log?

A. Yes.

X Q. 20. State whether or not the storms you met will go down in history as unique—the sort that an experienced mariner does not meet or hear of others meeting in (a) two decades, (b) one decade, or even (c) once in five years, in the North Atlantic in voyages from Spain to New York.

A. Yes, it was exceptional.

X Q. 21. State whether you were prepared to meet these storms you did meet.

A. Yes.

X Q. 22. State whether or not you expected to meet strong

gales on this voyage from Spain to New York in November-December, 1925.

A. I did.

X Q. 23. State whether or not you ever heard of any mariner meeting (a) strong gales and (b) hurricanes in voyages from Spain to New York, in November-December.

A. I have often heard from mariners of their meeting (a) strong gales and (b) hurricanes in voyages from Spain to New York in November and December.

X Q. 24. State whether or not November-December is one of the worst seasons of the year for storms in the North Atlantic.

A. Yes.

X Q. 25. State whether the weather you experienced on the voyage in November-December, 1925, was the sort you, as an experienced mariner, did not prepare to meet, never heard of and never anticipated.

A. I was prepared for all contingencies.

X Q 26. State (a) the number of the crew and (b) officers [fol. 291] on the S. S. Vallescura in November, 1925.

A. (a) I believe there were 32 crew and (b) two officers.

X Q. 27. State the name of the officer in charge of each hold at the time of loading, and the names of the crew who assisted him at (a) Gandia, (b) Denia.

A. Chief Officer Barone, and Second Officer Irrera, both at (a) Gandia, (b) Denia, the names of the crew who assisted them I do not remember.

X Q. 28. State the exact time when you examined the loading and the time spent (a) at Gandia, (b) at Denia, (c) if you examined more than once, state the exact time of each examination and the time spent in examination.

A. During the loading I made several examinations both (a) at Gandia, (b) at Denia, (c) I do not remember the exact time but I satisfied myself.

X Q. 29. State whether you went ashore at (a) Gandia, (b) Denia.

A. (a) Yes, (b) Yes.

X Q. 30. State the distance between Denia and Gibraltar.

A. About 300 miles.

X Q. 31. State the usual running time between Denia and Gibraltar.

A. One day and a half.

X Q. 32. State if on the voyage in question, in Novem-

ber-December, 1925, any report was made to you of any defect in or damage to the engines, boilers, or any other machinery (a) before leaving Denia, (b) at Denia, (c) after leaving Denia and before reaching Gibraltar, (d) at Gibraltar, (e) after Gibraltar and before reaching New York.

A. When I arrived at Gibraltar I found a small leakage in the boiler which I remedied before leaving. (a) No. (b) No. (c) No. (d) Yes, at Gibraltar. (e) Yes.

[fol. 292] X Q. 33. If your answer to any part of the prior interrogatory is that you did receive a report, state: (a) the time and date when received; (b) the place where and by whom made; (c) attach a copy of the report and state the substance thereof; (d) what you did in detail.

A. When we left Gibraltar the first time about one hour the Chief Engineer advised me of a small leakage in the pipes of the boiler. We returned to Gibraltar and made repairs on board and then we sailed again.

X Q. 34. State (a) whether a survey was made of the defects or damage at Gibraltar, and (b) annex a copy thereof, and (c) state the name and address of the surveyor, and (d) the substance of the survey report, if same is not in writing or you have no copy thereof, (e) if report was made in writing and you do not attach a copy thereof, state where a copy of such report will be found and where you saw it for the last time.

A. No survey was made.

X Q. 35. State whether the defects or damage was (a) repaired, (b) by whom repaired—name and address, (c) when the repair work was commenced, (d) when completed.

A. Repaired by engineers on board; Chief Engineer, and Second Engineer and Third Engineer.

X Q. 36. State when the vessel on the voyage in question sailed from Denia, the date and exact time of day.

A. November 12, 1925, at 11.45 a. m.

X Q. 37. State the amount of (a) coal and (b) if she also used oil, the amount of oil the vessel had at the time of sailing from Denia.

A. (a) about 700 tons of coal.

X Q. 38. State the amount of (a) coal, (b) oil the vessel [fol. 293] had on arrival at Gibraltar.

A. I do not remember.

X Q. 39. State the amount of fuel you would require the

vessel to have for a voyage from Denia to New York in November-December, 1925: (a) coal, if coal burner only, (b) oil, if oil burner only, (c) coal and oil, if used both, (d) state how you arrive at your figures.

A. About 500 tons of coal.

X Q. 40. State the date and time of arrival in Gibraltar on the voyage in question.

A. November 14, 1925, at 8.20 a. m.

X Q. 41. State the number of times the vessel stopped in its voyage between Denia and Gibraltar.

A. None.

X Q. 42. State the date and time of leaving Gibraltar.

A. November 16th at 5 o'clock a. m.

X Q. 43. State the amount of coal and the amount of oil the vessel had on leaving Gibraltar.

A. About 700 tons of coal.

X Q. 44. State the number of times the vessel stopped on its voyage from Gibraltar to New York.

A. None.

X Q. 45. State how much coal and oil you had when you arrived in New York.

A. I do not remember.

X Q. 46. State the exact day and time of day the hatches were open, the length of time they were open, without referring to any memorandum or book.

A. I do not remember the time, but when the weather was suitable they were opened, when the weather was unsuitable they were closed.

X Q. 47. If you cannot answer the prior interrogatory without referring to a memorandum or book, you may refer to a memorandum or book, if you care to, and answer the [fol. 294] question.

A. I have no memorandum other than that contained in the log.

X Q. 48. If you answered the prior interrogatory by referring to a memorandum or book, state if the memorandum or book is (a) in your handwriting, (b) when made, (c) where in the memorandum or book it so states and (d) hand it or them to the Commissioner and request him to mark them as exhibits.

A. Same as above. (47).

X Q. 49. State whether you placed covers over your ven-

tilators (a) at any time, (b) give day and time of day for each placing and removal.

A. In good weather I opened the ventilators in the day time and closed them at night, and in bad weather the ventilators were kept closed at all times.

X Q. 50. If you have testified that you have the original logs of the voyage in question, state (a) whether they are scrap and/or final logs, (b) whether they are chief officer's or Bridge log and/or engineer's log, (c) name the officers who kept them, (d) where you obtained them and when and from whom, stating the person's relation to the vessel, its owners and its charterers.

A. I have not the original log but only a photostatic copy of the official log of the vessel.

X Q. 51. If you have testified you have not the original logs, state (a) where the scrap logs are, (b) where the original chief officer's or Bridge log is, (c) where the engineer's log is, (d) when you saw them for the last time and where.

A. I do not remember.

X Q. 52. State where you obtained the alleged photostats of the logs, if you testify to any, and where and from whom, [fol. 295] stating the person's relation to the vessel, its owners and charterers.

A. The Agents of the Company at New York gave me the photostatic copies which I have presented.

X Q. 53. If you testified you saw the onions on arrival at New York, state: (a) the day and time of day you saw them each time you did see them; (b) the place each time you saw them; (c) the time you spent in each examination; (d) the details of how you examined them.

A. I do not remember.

X Q. 54. (a) Has your testimony in this matter been entirely on your own knowledge or has it been based on what you heard from others? (b) Have you had any conversation with any one respecting your answers to any of the questions which have been addressed to you? (c) If so, state what the conversations were and with whom they were had. (d) Have you received any letters or other writings from any one with respect to your answers to any of the questions which have been addressed to you? (e) If so, hand the letters or writings to the Commissioner and request him to mark them as exhibits.

A. (a) My own memory. (b) None. (c) None. (d) None. (e) None.

X Q. 55. (a) Have you refreshed your recollection from any notes or memorandum or any writings? (b) If so, hand them to the Commissioner and request him to mark them as exhibits.

A. From my memory and from the photostatic copy of the log.

X Q. 56. Have you testified from your unaided memory?

A. From my memory and from the photostatic copy of the log.

(Here follow Exhibits Nos. 6 and 9, side folios 296 and 296a.)

LLOYD MEDITERRANEO

SOCIETA' ITALIANA DI NAVIGAZIONE

ANONIMA SEDE IN ROMA

Capitale Sociale L. 84.000.000 int. versato

Head Office: GENOA - Via Malta, 4-4

Teleph. 66-28 — Tel. ad. "LLOYDMARE,,



MEDITERRANEAN - NORTH AMERICAN SERVICE

Steamer to discharge at heated wharf. Three pence per package of fruit is payable by receivers in consideration of ten days free wharfage and hearing even if the heating be unnecessary and not used. The time is to count from the actual discharge of the fruit; if after such ten days the receivers have not taken delivery of the goods there is an extra charge for this service of two cents per package and per day.

22 980 Kilos

FREIGHT.

766 m/cu at 1.87.5. . Ptas. 1.436.25

Kombres — " 3. —

Kilos — " 45.96

Shipped, in apparen
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to be delivered from Ship'
exemptions from liability p

Freight for the saids Good

1. Owners to be exempt from los
of God, the King's Enemies, Pirates,
Thieves, Vermin, Barratry of Ma
Princes and Rulers or People, Capt
Damage resulting from any of the
from the Negligence, Default, or
Master, Mariners, Enginoers, Steved
in the service of the Ship or otherv
belonging to or sailing under the fl
namely: — Risk of Lightorage to
or Hulk, or Transhipment, Stowag
Evaporation from any other goods,
in Craft or Hulk, or on Shore, Bur
of the Ship at the commencement
arising from Breakage of Shafts, o
chinery, or Appurtenances, or from
or injury thereto, howsoever such d
Collision, Stranding, Straining, or
Navigation, or Land Transit of wha
howsoever caused, with liberty (in e
this or into any other port, or othe
cause from commercing or proceed
her voyage) to ship or tranship th
and with liberty to proceed, under
vessel, or in any other manner whic
2. The Company reserves liberty b
quent period, and so often as may fo
and at any place, to ship the whole
other Steamer or Vessel, whether be
or to tranship or land and store, or p
or otherwise, for such time as may
to re-ship by Lighter or otherwise in
or Vessel whether belonging to the
for the Steamer or substituted Stea
any Port with or without Pilots, t
situations, or to be towed although
to carry Goods of all kinds, danger
cargo on deck, and to proceed to har
ning to or staying at any Port or
Britain, Ireland, France, Germany, B
Egypt, Mediterranean, Adriatic, Le
purpose of trading or for any purp
rotation, and whether in or out of th
without the same being deemed a
tions and exemptions from liability
shall apply to such substituted vess
3. Weight, Measurement, Gauge, Co
dition, Brand, and Value unknown,
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rage, wastage, rust, decay rain, spray
or heat of hold, bursting of bags, da
quality, defects, slightness or insufici
or smell or evaporation from any
delivery of goods, arising from inaccu
or absence of marks of numbers, or f
stated in this Bill of Lading, or injur
4. All fines, expenses, losses or dama
Agents or servants or the ship or
account of incorrect or insufficient
descriptions of their weight or conte
such contents, shall be paid by
may be required, and the Shipowner
for the payment thereof.

LIBELLANT'S EXHIBIT No. 6

LOR

RRANEO

IGAZIONE

ROMA

O Int. versato

Malta, 4-4

LOYDMARE „

L.VA LAMAIGNERE VALENCIA

AMERICAN

f. Three pence per in consideration of if the hiring be to count from the n days the receivers is an extra charge and per day.

Shipped, in apparent good order and condition by Gaetano Olivieri whereof is Master for the present Voyage — in and upon the Steamship Palermitano or whoever else may go as Master in the said Ship, and now lying in the Port of Genova for carriage to New York and if failing shipment by her then the Goods to be shipped by the following Steamship, or any other of the same line, but with liberty either before or after proceeding towards port of destination to proceed to, and stay at, any ports or places whatsoever (although in a contrary direction to, or out of, or beyond, the route to the said port of discharge) once or oftener, in any order, backwards or forwards, for loading or discharging cargo or passengers, or for any purpose whatsoever, including drydocking for painting or other purpose and all such ports, places and sailings shall be deemed included within the intended voyage; also with liberty to tow and assist vessels in all situations, and to deviate for the purpose of saving life or property; also to sail with or without pilots, and to carry goods of all kinds, and with liberty to tranship any part of the cargo by steamer or steamers, the following packages, said to contain lawfull merchandises as hereinafter specified:

Bund Mouldings Seven hundred and sixty six half cases of onions

to be delivered from Ship's deck, where the Ship's responsibility shall cease, in the like apparent good order and condition, subject to the terms, conditions and exemptions from liability printed hereon, at — or any other place being within the jurisdiction of the Custom House of the aforesaid Port of unto order or to his or their assigns.

Freight for the saids Goods agreed upon as per margin, and payable at Genoa

1. Owners to be exempt from loss or damage caused by the Act of God, the King's Enemies, Pirates, Robbers by land or sea, Jettison, Thieves, Vermin, Barratry of Master or Mariners, Restraints of Princes and Rulers or People, Capture, Seizure or Embargo. Loss or Damage resulting from any of the following perils, whether arising from the Negligence, Default, or Error in Judgment of the Pilot, Master, Mariners, Engineers, Stevedores, or other Persons, whether in the service of the Ship or otherwise, or any other Ship or Ships belonging to or sailing under the flag of the Company, or otherwise; namely: — Risk of Lighterage to or from the Vessel or of Craft or Hulk, or Transhipment, Stowage, or Contact with or Smell or Evaporation from any other goods, Explosion, Heat, or Fire at Sea, in Craft or Hulk, or on Shore, Bursting of Boilers, Unseaworthiness of the Ship at the commencement or at any period of the Voyage arising from Breakage of Shafts, or any latent defect in Hull, Machinery, or Appurtenances, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, Collision, Stranding, Straining, or other perils of the Seas, Rivers, Navigation, or Land Transit of whatever nature or kind soever and howsoever caused, with liberty (in event of Steamer putting back to this or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or tranship the Goods by any other Steamer, and with liberty to proceed, under sail, or in tow of any other vessel, or in any other manner which the Shipowner may think fit.

2. The Company reserves liberty before shipment, or at any subsequent period, and so often as may for any cause be deemed expedient, and at any place, to ship the whole or any part of the goods by any other Steamer or Vessel, whether belonging to the Company or not, or to tranship or land and store, or put into hulk or craft by lighter or otherwise, for such time as may be deemed expedient, and thence to re-ship by Lighter or otherwise in the same or any other Steamer or Vessel whether belonging to the Company or not, with liberty for the Steamer or substituted Steamer or Vessel to sail or call any Port with or without Pilots, to tow and assist vessels in all situations, or to be towed although deviating from the voyage, and to carry Goods of all kinds, dangerous or otherwise, and to carry cargo on deck, and to proceed to her port of Destination, first returning to or staying at any Port or Ports in any order in Great Britain, Ireland, France, Germany, Belgium, Spain, Portugal, Africa, Egypt, Mediterranean, Adriatic, Levant, or Black Seas, for the purpose of trading or for any purpose whatsoever, in any order or rotation, and whether in or out of the customary or advertised route, without the same being deemed a deviation. All the terms, conditions and exemptions from liability contained in this Bill of Lading shall apply to such substituted vessel or vessels.

3. Weight, Measurement, Gauge, Contents, Quantity, Quality, Condition, Brand, and Value unknown, and not accountable for loss or damage resulting from stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay rain, spray frost, thaw, effect of climate, or heat of hold, bursting of bags, damage by rats, deterioration in quality, defects, slightness or insufficiency of packages, contact with or smell or evaporation from any other goods, nor for incorrect delivery of goods, arising from inaccuracies, obliteration, insufficiency or absence of marks of numbers, or from any such being incorrectly stated in this Bill of Lading, or injury to wrappers however caused.

4. All fines, expenses, losses or damage which the Shipowner or his Agents or servants or the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the packages or descriptions of their weight or contents, or the dangerous nature of such contents, shall be paid by the Shipper or Consignee as

5. Simultaneously with the Ship being ready to unload the above-mentioned Goods, or any part thereof, the Consignee of the said Goods is hereby bound to be ready to receive the same from the Ship's side, either on the Wharf or Quay at which the Ship may lie for discharge or into lighters provided with a sufficient number of men to receive and stow the said Goods therein, and in default thereof, the Master or Agent of the Ship, and the Collector of above port are hereby authorised to enter the said Goods at the Custom-house, and land, warehouse, or place them in Lighter, without notice to and at the risk and expense of the said Consignee of the Goods, after they leave the deck of the Ship. The Collector of the Port of Discharge being hereby authorised to grant a general order for discharge immediately after entry of the Ship. Steamer to work at night if required by Owners, Steamer paying any extra expense incurred thereby.

9. Ship to have a lien on all Goods for payment of freight and charges, through freights, including dead-freight, demurrage, forwarding, charges, charges for carriage to Port of Shipment, and the fines, damages, and expenses mentioned in clauses 5, 15 & 16, and any others charges stipulated in the Bill of Lading and for general average claims, and to be entitled to recover from the Shipper the difference between the amount of freight stipulated in the Bill of Lading and the proceeds of the Goods, should the freight not be paid otherwise. Full freight is due on damaged Goods and on Goods diminished by leakage, and on perishable cargo and it is to be paid by the Shipper or Consignee in whatever condition they may be delivered. Freight if payable by Shipper, is due in full in exchange for Bill of Lading, and to be considered as earned, ship lost or not lost, and is payable by Consignee, on arrival of Goods at place of destination in exchange for delivery order, settlement in either case to be made without discount or abatement. Ship not accountable for any loss in market value caused by wrong or delayed delivery of Goods. Freight on Goods to order, liquids and brittle or perishable goods, payable by Shipper if required. In the event of damage, loss, non-delivery, or short delivery, Shipowner not to be liable for more than the invoice value of the Goods, less freight and all charges.

10. The Shipowner is not to be liable for any damage to any Goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the Goods, nor for claims for damage or detention to Goods under Through Bills of Lading where the damage is done or detention occurs whilst the Goods are not in the possession of the Shipowner, nor in any case for more than the invoice or declared value of the Goods, which ever shall be the least. Not accountable to any extent for gold or silver, manufactured or unmanufactured, or in shape of coin, plated articles, glass, china, jewelry, precious stones, trinkets, nor for any other highly valued Goods, nor for any package above the value for 200 dollars unless Bills of Lading be signed therefor, with the value therein expressed, and a Special Agreement made.

11. The only condition on which glass, earthenware or china, will be carried is that the Shipowner will not be held liable for any breakage which may occur, however caused. Steamer not to be responsible for leakage of wine casks, arising from any cause whatever, or for damage to other goods caused thereby.

12. Shippers will be held accountable for all damage caused by goods of an inflammable, explosive, or otherwise dangerous character shipped without permission or without full disclosure of their nature, whether such Shippers shall be aware thereof or not, and whether such Shippers shall be Principals or Agents only, and such Goods may be seized and confiscated or destroyed by the

or in case of the Master considering the entry of any port, either from epidemic or otherwise, unsafe or injurious to the further prosecution of the Steamer's intended voyage, or in case of ice preventing the Steamer from reaching her port of discharge without delay, the Goods may be landed or put into quarantine depot, lazaretto, hulk, lighter, or other vessel or place necessary for the Ship's despatch, at the Consignee's risk and expense, or the Master may carry on the Goods to the nearest port to which he is bound and there land them, and thereupon the Shipowners' responsibility hereunder shall absolutely cease, and in the event of Cargo being re-shipped to original destination from such port at which Cargo is landed, the risk of such re-shipment and all expenses freight, &c, in connection therewith, to be for account of the Owners of the Goods. All quarantine expenses upon the Goods, of whatever nature, are payable by the Shipper or Consignee.

16. Steamer not to be responsible for any delay to Cargo caused by Strikes, Look-outs, or combination of Officers, Engineers, Crew, Dock Labourers, Stevedores, Lightermen, or any other hands connected with the loading or discharging of the Steamer.

17. Not accountable for wrong marks or numbers. 1924

18. General Average payable according to York Antwerp Rules 1890, and as to matters not therein provided for, according to the usage of the Port of final destination, and to be adjusted at Port of final destination and average bond to be signed with values declared thereon, and sufficient security to be given, as required by the Master or his Agent. If the Owner of the Steamer shall have exercised due diligence to make said Steamer in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from fault or negligence of the pilot master or crew or management of the Steamer, or from latent or other defects, or unseaworthiness of the Steamer, whether existing at time of shipment or at the beginning of the voyage but not discoverable by due diligence, the Consignees or Owners of the Cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred, but, with the Shipowner, shall contribute in General Average, and shall pay such special charges as if such danger damage or disaster had not resulted from such fault, negligence, latent or other defects, or unseaworthiness. Passengers' Effects, if any, not to contribute in General Average, but claims for passengers' effects sacrificed to be allowed in General Average, less their proper contribution in such case.

19. Freight and charges, if payable at Port of Destination, to be paid on delivery in cash, without discount. Prepaid freight cannot be reclaimed. Ship or Goods lost or not lost.

20. All expenses incurred for cooperage of Cargo shall be borne by Consignee.

21. Glass is only accepted for carriage, and shipped, on condition that the Carrier shall not be liable for breakage of same, however such breakage may be caused, even if by bad stowage, rough handling, or negligence on the part of any servant of the shipowner before or after the commencement of the Voyage

22. The carrying Company shall under no circumstances be responsible for any loss or damage whatever, caused or arising before the goods come within reach of, or after leaving the tackles of their vessel, for the purpose of transhipment or any other purpose whatever.

23. Both Shipper and Consignee remain liable for the freight on

Landing Certificate for all Bonded Goods free of expense to the ship.
Announce same, together with primage and charges, will be collected at port or place of discharge
Exchange.

Ship. 1.436.25
" 3.—
45.96

ANONIMA SEDE IN ROMA

Capitale Sociale L. 54.000.000 int. versato

Boud° Mourkous

Head Office: GENOA - Via Malta, 4-4

Teleph. 66-28 – Tel. ad. "LLOYDMARE"



MEDITERRANEAN - NORTH AMERICAN SERVICE

Steamer to discharge at heated wharf. Three pence per package of fruit is payable by receivers in consideration of ten days free wharfage and heating even if the heating be unnecessary and not used. The time is to count from the actual discharge of the fruit; if after such ten days the receivers have not taken delivery of the goods there is an extra charge for this service of two cents per package and per day.

22 980 Kilos

FREIGHT.

766 m/m at 1.87.5. . Pts. 1.436.25
Kombos – " 3.–
Kday – " 45.96
" Total Pts 1.485.21
Primage . . . . "
Disbursements . . " Freight ; Hauges ; J
Maritime Exchange " Transport Esq
" Prepaid
"
"

NELCHOR ROMAN ADROVER
Nº 5

Seven hundred sixty six half cases of onions

to be delivered from Ship's deck, where the Ship's responsibility shall cease, in the like apparent good order and condition, subject to exemptions from liability printed hereon, at — or any other place being within the jurisdiction of the Custom Ho
unto Order
Freight for the saids Goods agreed upon as per margin, and payable at Gandia

1. Owners to be exempt from loss or damage caused by the Act of God, the King's Enemies, Pirates, Robbers by land or sea, Jettison, Thieves, Vermin, Barratry of Master or Mariners, Restraints of Princes and Rulers or People, Capture, Seizure or Embargo, Loss or Damage resulting from any of the following perils, whether arising from the Negligence, Default, or Error in Judgment of the Pilot, Master, Mariners, Engineers, Stevedores, or other Persons, whether in the service of the Ship or otherwise, or any other Ship or Ships belonging to or sailing under the flag of the Company, or otherwise; namely: — Risk of Lighterage to or from the Vessel or of Craft or Hulk, or Transhipment, Stowage, or Contact with or Smell or Evaporation from any other goods, Explosion, Heat, or Fire at Sea, in Craft or Hulk, or on Shore, Bursting of Boilers, Unseaworthiness of the Ship at the commencement or at any period of the Voyage arising from Breakage of Shafts, or any latent defect in Hull, Machinery, or Appurtenances, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, Collision, Stranding, Straining, or other perils of the Seas, Rivers, Navigation, or Land Transit of whatever nature or kind soever and howsoever caused, with liberty (in event of Steamer putting back to this or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or tranship the Goods by any other Steamer, and with liberty to proceed, under sail, or in tow of any other vessel, or in any other manner which the Shipowner may think fit.

2. The Company reserves liberty before shipment, or at any subsequent period, and so often as may for any cause be deemed expedient, and at any place, to ship the whole or any part of the goods by any other Steamer or Vessel, whether belonging to the Company or not, or to tranship or land and store, or put into hulk or craft by Lighter or otherwise, for such time as may be deemed expedient, and thence to re-ship by Lighter or otherwise in the same or any other Steamer or Vessel whether belonging to the Company or not, with liberty for the Steamer or substituted Steamer or Vessel to sail or call at any Port with or without Pilots, to tow and assist Vessels in all situations, or to be towed although deviating from the voyage, and to carry Goods of all kinds, dangerous or otherwise, and to carry cargo on deck, and to proceed to her port of Destination, first returning to or staying at any Port or Ports in any order in Great Britain, Ireland, France, Germany, Belgium, Spain, Portugal, Africa, Egypt, Mediterranean, Adriatic, Levant, or Black Seas, for the purpose of trading or for any purpose whatsoever, in any order or rotation, and whether in or out of the customary or advertised route, without the same being deemed a deviation. All the terms, conditions and exemptions from liability contained in this Bill of Lading shall apply to such substituted vessel or vessels.

3. Weight, Measurement, Gauge, Contents, Quantity, Quality, Condition, Brand, and Value unknown, and not accountable for loss or damage resulting from stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay rain, spray frost, thaw, effect of climate, or heat of hold, bursting of bags, damage by rats, deterioration in quality, defects, slightness or insufficiency of package, contact with or smell or evaporation from any other goods, nor for incorrect delivery of goods, arising from inaccuracies, obliteration, insufficiency or absence of marks of numbers, or from any such being incorrectly stated in this Bill of Lading, or injury to wrappers however caused.

4. All fines, expenses, losses or damage which the Shipowner or his Agents or servants or the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the packages or descriptions of their weight or contents, or the dangerous nature of such contents, shall be paid by the Shipper or Consignee as may be required, and the Shipowner shall have a lien upon the goods for the payment thereof.

5. The highest rate of freight will be charged on all goods incorrectly described, either as to contents, weight, or quantity. In cases where measurement or weight of goods is found to have been understated by Shipper, double freight will be charged on the difference between the stated and true measurement or weight.

6. Parcels for different consignees, collected and made up in single packages, addressed to one party for delivery in America, for the purpose of evading payment of freight, will, upon examination at Port of landing by the Customs, be charged with the proper freight on each parcel.

7. Goods delivered to the steamer, while on Quay awaiting shipment to be at Shipper's risk entirely. Owners accepting no responsibility. Goods once shipped cannot be taken away by the Shipper except upon payment of full freight, together with the expense of loading them, and compensated for any damage sustained by the Owner through such taking away.

8. Simultaneously with the Ship being ready to unload the above-mentioned Goods, or any part thereof, the Consignee of the said Goods is hereby bound to be ready to receive the same from the Ship's side, either on the Wharf or Quay at which the Ship may lie for discharge or into lighters provided with a sufficient number of men to receive and stow the said Goods therein, and in default thereof, the Master or Agent of the Ship, and the Collector of above port are hereby authorised to enter the said Goods at the Custom-house, and land, warehouse, or place them in lighter, without notice to and at the risk and expense of the said Consignee of the Goods, after they leave the deck of the Ship. The Collector of the Port of Discharge being hereby authorised to grant a general order for discharge immediately after entry of the Ship. Steamer to work at night if required by Owners, Steamer paying any extra expense incurred thereby.

9. Ship to have a lien on all Goods for payment of freight and charges, through freights, including dead-freight, demurrage, forwarding, charges, charges for carriage to Port of Shipment, and the fines, damages, and expenses mentioned in clauses 5, 15 & 16, and any others charges stipulated in the Bill of Lading and for general average claims, and to be entitled to recover from the Shipper the difference between the amount of freight stipulated in the Bill of Lading and the proceeds of the Goods, should the freight not be paid otherwise. Full freight is due on damaged Goods and on Goods diminished by leakage, and on perishable cargo and it is to be paid by the Shipper or Consignee in whatever condition they may be delivered. Freight if payable by Shipper, is due in full in exchange for Bill of Lading, and to be considered as earned, ship lost or not lost, and is payable by Consignee, on arrival of Goods at place of destination in exchange for delivery order, settlement in either case to be made without discount or abatement. Ship not accountable for any loss in market value caused by wrong or delayed delivery of Goods. Freight on Goods to order, liquids and brittle or perishable goods, payable by Shipper if required. In the event of damage, loss, non-delivery, or short delivery, Shipowner not to be liable for more than the invoice value of the Goods, less freight and all charges.

10. The Shipowner is not to be liable for any damage to any Goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the Goods, nor for claims for damage or detention to Goods under Through Bills of Lading where the damage is done or detention occurs whilst the Goods are not in the possession of the Shipowner, nor in any case for more than the invoice or declared value of the Goods, which ever shall be the least. Not accountable to any extent for gold or silver, manufactured or unmanufactured, or in shape of coin, plated articles, glass, china, jewelry, precious stones, trinkets, nor for any other highly valued Goods, nor for any package above the value for 200 dollars unless Bills of Lading be signed therefor, with the value therein expressed, and a Special Agreement made.

11. The only condition on which glass, earthenware or china, will be carried is that the Shipowner will not be held liable for any breakage which may occur, however caused. Steamer not to be responsible for leakage of wine casks, arising from any cause whatever, or for damage to other goods caused thereby.

12. Shippers will be held accountable for all damage caused by goods of an inflammable, explosive, or otherwise dangerous character shipped without permission or without full disclosure of their nature, whether such Shippers shall be aware thereof or not, and whether such Shippers shall be Principals or Agents only, and such Goods may be seized and confiscated or destroyed by the Shipowner at any time before delivery, without any compensation to the Shipper or Consignee.

13. This Bill of Lading, duly endorsed, to be given in exchange for delivery order.

14. In the event of war, hostilities, civil commotion, riot disturbance, blockade or interdict of the port of discharge, warlike or naval operations or demonstration (whether existing or only anticipated); or other circumstances which, in the opinion of the Master, give rise, or are likely to give rise, to delay or difficulty in reaching, discharging at, or leaving the port of discharge, the Master is to be at liberty, in his absolute discretion, to proceed to and or discharge the Cargo at such other port or ports as he thinks most advisable under the circumstances, and thereupon the Cargo shall be at the sole risk and expense of the receivers, and the Ship and shipowner shall be freed from all responsibility in respect thereof.

15. In case of the entry of the port of discharge being interdicted, or communication therewith rendering or being liable to render the Vessel liable to quarantine at that or any subsequent port, or in case of the Master consider... from epidemic or otherwise, un... prosecution of the Steamer's int... preventing the Steamer from re... without delay, the Goods may b... depot, lazaretto, hulk, lighter, s... for the Ship's despatch, at the ... the Master may carry on the Go... he is bound and there land them... responsibility hereunder shall ab... of Cargo being re-shipped to ori... at which Cargo is landed, the r... expenses freight, &c, in connecti... of the Owners of the Goods. Al... Goods, of whatever nature, are ... signee.

16. Steamer not to be responsibl... by Strikes, Lock-outs, or combina... Dock Labourers, Stevedores, Light... nected with the loading or discha...

17. Not accountable for wrong ...

18. General Average payable accord... as to matters not therein provided ... Port of final destination, and to be ... and average bond to be signed ... sufficient security to be given, ... Agent. If the Owner of the Steam... gence to make said Steamer in all ... manned, equipped and supplied, ... of danger, damage or disaster ... of the pilot master or crew or ... from latent or other defects, or ... whether existing at time of ship... voyage but not discoverable by ... Owners of the Cargo shall not ... contribution in General Average or... but, with the Shipowner, shall co... shall pay such special charges as ... had not resulted from such fault, ... or unseaworthiness. Passengers' Eff... General Average, but claims for ... allowed in General Average, less ... case.

19. Freight and charges, if pay... paid on delivery in cash, without ... be reclaimed. Ship or Goods lost ...

20. All expenses incurred for coo... Consignee.

21. Glass is only accepted for ca... that the Carrier shall not be liab... such breakage may be caused, even ... or negligence on the part of any ... or after the commencement of th...

22. The carrying Company shal... sponsible for any loss or damage ... the goods come within reach of, ... their vessel, for the purpose of t... whatever.

23. Both Shipper and Consignee ... the entire quantity of Goods here... sound or unsounded. If freight on ... 72 hours after Goods are landed, ... goods by public auction, and if ... the freight, Ship shall hold Shipp... the balance.

24. Notice of any claim arising ... be given by the Consignee to the ... Destination, within 48 hours afte... deliver goods, and the claim to ... from the date hereof at the offic... and it is expressly agreed upon ... brought against the Ship in resp... any Goods herein specified except ... it being understood and agreed ... place or places where the Goods ... petent, notwithstanding that the ... there.

25. NOTICE - In accepting this Bill of Lading, the shipper, or other Agent of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether to be governed by the law of the flag of the steamer carrying the Goods, but any Average that may arise on the Voyage to be adjusted according to conditions named in clause 18, Not accord...

In witness whereof the Master of the Said Ship has signed Two Bills of Lading, all of this tenor and date, one of the others to stand void.

Date at Gandia, the 24th day of November 1925

The Shipper

For the Maste...
Received o...
NELCHOR ROMAN ...
P. P.

OMA

Int. versato

Malta, 4-4

OYDMARE ..

cified : Bund Seven hundred sixty five half cases of onions
Mandorle

to be delivered from Ship's deck, where the Ship's responsibility shall cease, in the like apparent good order and condition, subject to the terms, conditions and exemptions from liability printed hereon, at — or any other place being within the jurisdiction of the Custom House of the aforesaid Port of unto Order or to his or their assigns.

Freight for the saids Goods agreed upon as per margin, and payable at Genoa



AMERICAN

. Three pence per n consideration of if the vessel be to count from the n days the receivers is an extra charge and per day.

1. Owners to be exempt from loss or damage caused by the Act of God, the King's Enemies, Pirates, Robbers by land or sea, Jettison, Thieves, Vermin, Barratry of Master or Mariners, Restraints of Princes and Rulers or People, Capture, Seizure or Embargo, Loss or Damage resulting from any of the following perils, whether arising from the Negligence, Default, or Error in Judgment of the Pilot, Master, Mariners, Engineers, Stevedores, or other Persons, whether in the service of the Ship or otherwise, or any other Ship or Ships belonging to or sailing under the flag of the Company, or otherwise; namely: — Risk of Lighterage to or from the Vessel or of Craft or Hulk, or Transhipment, Stowage, or Contact with or Smell or Evaporation from any other goods, Explosion, Heat, or Fire at Sea, in Craft or Hulk, or on Shore, Bursting of Boilers, Unseaworthiness of the Ship at the commencement or at any period of the Voyage arising from Breakage of Shafts, or any latent defect in Hull, Machinery, or Appurtenances, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, Collision, Stranding, Straining, or other perils of the Seas, Rivers Navigation, or Land Transit of whatever nature or kind soever and howsoever caused, with liberty (in event of Steamer putting back to this or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or tranship the Goods by any other Steamer, and with liberty to proceed, under sail, or in tow of any other vessel, or in any other manner which the Shipowner may think fit.

2. The Company reserves liberty before shipment, or at any subsequent period, and so often as may for any cause be deemed expedient, and at any place, to ship the whole or any part of the goods by any other Steamer or Vessel, whether belonging to the Company or not, or to tranship or land and store, or put into hulk or craft by Lighter or otherwise, for such time as may be deemed expedient, and thence to re-ship by Lighter or otherwise in the same or any other Steamer or Vessel whether belonging to the Company or not, with liberty for the Steamer or substituted Steamer or Vessel to sail or call at any Port with or without Pilots, to tow and assist vessels in all situations, or to be towed although deviating from the voyage, and to carry Goods of all kinds, dangerous or otherwise, and to carry cargo on deck, and to proceed to her port of Destination, first returning to or staying at any Port or Ports in any order in Great Britain, Ireland, France, Germany, Belgium, Spain, Portugal, Africa, Egypt, Mediterranean, Adriatic, Levant, or Black Seas, for the purpose of trading or for any purpose whatsoever, in any order or rotation, and whether in or out of the customary or advertised route, without the same being deemed a deviation. All the terms, conditions and exemptions from liability contained in this Bill of Lading shall apply to such substituted vessel or vessels.

3. Weight, Measurement, Gauge, Contents, Quantity, Quality, Condition, Brand, and Value unknown, and not accountable for loss or damage resulting from stowage, sweating, leakage, breakage, pilferage, wastage, rust, decay rain, spray frost, thaw, effect of climate, or heat of hold, bursting of bags, damage by rats, deterioration in quality, defects, slightness or insufficiency of packages, contact with or smell or evaporation from any other goods, nor for incorrect delivery of goods, arising from inaccuracies, obliteration, insufficiency or absence of marks of numbers, or from any such being incorrectly stated in this Bill of Lading, or injury to wrappers however caused.

4. All fines, expenses, losses or damage which the Shipowner or his Agents or servants or the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the packages or descriptions of their weight or contents, or the dangerous nature of such contents, shall be paid by the Shipper or Consignee as may be required, and the Shipowner shall have a lien upon the goods for the payment thereof.

5. The highest rate of freight will be charged on all goods incorrectly described, either as to contents, weight, or quantity. In cases where measurement or weight of goods is found to have been understated by Shipper, double freight will be charged on the difference between the stated and true measurement or weight.

6. Parcels for different consignees, collected and made up in single packages, addressed to one party for delivery in America, for the purpose of evading payment of freight, will, upon examination at Port of landing by the Customs, be charged with the proper freight on each parcel.

7. Goods delivered to the steamer, while on Quay awaiting shipment, to be at Shipper's risk entirely, Owners accepting no responsibility. Goods once shipped cannot be taken away by the Shipper except upon payment of full freight, together with the expense of loading them, and compensated for any damage sustained by the Owner through such taking away.

8. Simultaneously with the Ship being ready to unload the above-mentioned Goods, or any part thereof, the Consignee of the said Goods is hereby bound to be ready to receive the same from the Ship's side, either on the Wharf or Quay at which the Ship may lie for discharge or into lighters provided with a sufficient number of men to receive and stow the said Goods therein, and in default thereof, the Master or Agent of the Ship, and the Collector of above port are hereby authorised to enter the said Goods at the Custom-house, and land, warehouse, or place them in Lighter, without notice to and at the risk and expense of the said Consignee of the Goods, after they leave the deck of the Ship. The Collector of the Port of Discharge being hereby authorised to grant a general order for discharge immediately after entry of the Ship. Steamer to work at night if required by Owners, Steamer paying any extra expense incurred thereby.

9. Ship to have a lien on all Goods for payment of freight and charges, through freights, including dead-freight, demurrage, forwarding, charges, charges for carriage to Port of Shipment, and the fines, damages, and expenses mentioned in clauses 5, 15 & 16, and any others charges stipulated in the Bill of Lading and for general average claims, and to be entitled to recover from the Shipper the difference between the amount of freight stipulated in the Bill of Lading and the proceeds of the Goods, should the freight not be paid otherwise. Full freight is due on damaged Goods and on Goods diminished by leakage, and on perishable cargo and it is to be paid by the Shipper or Consignee in whatever condition they may be delivered, Freight if payable by Shipper, is due in full in exchange for Bill of Lading, and to be considered as earned, ship lost or not lost, and is payable by Consignee, on arrival of Goods at place of destination in exchange for delivery order, settlement in either case to be made without discount or abatement. Ship not accountable for any loss in market value caused by wrong or delayed delivery of Goods. Freight on Goods to order, liquids and brittle or perishable Goods, payable by Shipper if required. In the event of damage, loss, non-delivery, or short delivery, Shipowner not to be liable for more than the invoice value of the Goods, less freight and all charges.

10. The Shipowner is not to be liable for any damage to any Goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the Goods, nor for claims for damage or detention to Goods under Through Bills of Lading where the damage is done or detention occurs whilst the Goods are not in the possession of the Shipowner, nor in any case for more than the invoice or declared value of the Goods, which ever shall be the least. Not accountable to any extent for gold or silver, manufactured or unmanufactured, or in shape of coin, plated articles, glass, china, jewelry, precious stones, trinkets, nor for any other highly valued Goods, nor for any package above the value for 100 dollars unless Bills of Lading be signed therefor, with the value therein expressed, and a Special Agreement made.

11. The only condition on which glass, earthenware or china, will be carried is that the Shipowner will not be held liable for any breakage which may occur, however caused. Steamer not to be responsible for leakage of wine casks, arising from any cause whatever, or for damage to other goods caused thereby.

12. Shippers will be held accountable for all damage caused by goods of an inflammable, explosive, or otherwise dangerous character shipped without permission or without full disclosure of their nature, whether such Shippers shall be aware thereof or not, and whether such Shippers shall be Principals or Agents only, and such Goods may be seized and confiscated or destroyed by the Shipowner at any time before delivery, without any compensation to the Shipper or Consignee.

13. This Bill of Lading, duly endorsed, to be given in exchange for delivery order.

14. In the event of war, hostilities, civil commotion, riot disturbance, blockade or interdict of the port of discharge, warlike or naval operations or demonstration (whetar existing or only anticipated); or other circumstances which, in the opinion of the Master, give rise, or are likely to give rise, to delay or difficulty in reaching, discharging at, or leaving the port of discharge, the Master is to be at liberty, in his absolute discretion, to proceed to and or discharge the Cargo at such other port or ports as he thinks most advisable under the circumstances, and thereupon the Cargo shall be at the sole risk and expense of the receivers, and the Ship and shipowner shall be freed from all responsibility in respect thereof.

15. In case of the entry of the port of discharge being interdicted, or communication therewith rendering or being liable to render the Vessel liable to quarantine at that or any subsequent port, or in case of the Master considering the entry of any port, either from epidemic or otherwise, unsafe or injurious to the further prosecution of the Steamer's intended voyage, or in case of ice preventing the Steamer from reaching her port of discharge without delay, the Goods may be landed or put into quarantine depot, lazaretto, hulk, Lighter, or other vessel or place necessary for the Ship's despatch, at the Consignee's risk and expense, or the Master may carry on the Goods to the nearest port to which he is bound and there land them, and thereupon the Shipowners' responsability hereunder shall absolutely cease, and in the event of Cargo being re-shipped to original destination from such port at which Cargo is landed, the risk of such re-shipment and all expenses freight, &c, in connection therewith, to be for account of the Owners of the Goods. All quarantine expenses upon the Goods, of whatever nature, are payable by the Shipper or Consignee.

16. Steamer not to be responsible for any delay to Cargo caused by Strikes, Lock-outs, or combination of Officers, Engineers, Crew, Dock Labourers, Stevedores, Lightermen, or any other hands connected with the loading or discharging of the Steamer.

17. Not accountable for wrong marks or numbers. 1924

18. General Average payable according to York Antwerp Rules 1890, and as to matters not therein provided for, according to the usage of the Port of final destination, and to be adjusted at Port of final destination and average bond to be signed with values declared therein, and sufficient security to be given, as required by the Master or his Agent. If the Owner of the Steamer shall have exercised due diligence to make said Steamer in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from fault or negligence of the pilot master or crew or management of the Steamer, or from latent or other defects, or unseaworthiness of the Steamer, whether existing at time of shipment or at the beginning of the voyage but not discoverable by due diligence, the Consignees or Owners of the Cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred, but, with the Shipowner, shall contribute in General Average, and shall pay such special charges as if such danger damage or disaster had not resulted from such fault, negligence, latent or other defects, or unseaworthiness. Passengers' Effects, if any, not to contribute in General Average, but claims for passengers' effects sacrificed to be allowed in General Average, less their proper contribution in such case.

19. Freight and charges, if payable at Port of Destination, to be paid on delivery in cash, without discount. Prepaid freight cannot be reclaimed. Ship or Goods lost or not lost.

20. All expenses incurred for cooperage of Cargo shall be borne by Consignee.

21. Glass is only accepted for carriage, and shipped, on condition that the Carrier shall not be liable for breakage of same, however such breakage may be caused even if by bad stowage rough handling, or negligence on the part of any servant ... the Shipowner before or after the commencement of the Voyage

22. The carrying Company shall under no circumstances be responsible for any loss or damage whatever, caused or arising before the goods come within reach of, or after leaving the tackles of their vessel, for the purpose of transhipment or any other purpose whatever.

23. Both Shipper and Consignee remain liable for the freight on the entire quantity of Goods herein enumerated, whether delivered sound or unsound. If freight on perishable goods remains unpaid 72 hours after Goods are landed, the Ship's Agent may sell such goods by public auction, and if the sum realised does not cover the freight, Ship shall hold Shipper and Consignee alike liable for the balance.

24. Notice of any claim arising under this Bill of Lading, must be given by the Consignee to the Steamer's Agent at the Port of Destination, within 48 hours after the landing of, or failure to deliver goods, and the claim to be preferred within ninety days from the date hereof at the offices of the owner of the steamer and it is expressly agreed upon that no legal proceedings may be brought against the Ship in respect of any loss of or damage to any Goods herein specified except in the place here vessel is owned, it being understood and agreed that every other tribunal in the place or places where the Goods were shipped or landed is incompetent, notwithstanding that the Ship may be legally represented there.

Consignees must furnish Landing Certificate for all Bonded Goods free of expense to the ship.
If freight is not paid in advance same, together with primage and charges, will be collected at port or place of discharge at Ten per cent. premium of exchange.

25. NOTICE - In accepting this Bill of Lading, the shipper, or other Agent of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed. This Contract to be governed by the law of the flag of the steamer carrying the Goods, but any Average that may arise on the Voyage to be adjusted according to conditions named in clause 18, Not accountable for wrong marks or numbers.

In witness whereof the Master of the Said Ship has signed Three Bills of Lading, all of this tenor and date, one of which being accomplished the others to stand void.

Date at Genoa, the 24th day of November 1924

The Shipper

For the Master
Steward on board
NELCHOR ROMAN ADROVER
P. P.

296-a

LIBELLANT'S EXHIBIT No. 9

TREASURY DEPARTMENT.
Customs Form 3065 A.
Arts. 1313, 1321, C. R. 1923.
C. D., Aug. 11-28.

United States Customs Service.

Return and Certificate of Weight, Gauge, or Measure of Imported Merchandise.

Entry No. 813138

, 192

District No. 10 Port of NEW YORK NOV 19 1928, 192

Merchandise imported by H. Schnell & Co

on the S/S Vallescura from Gandia Dec 6 1925

MARKS.	NUMBERS.	ARTICLES.	GROSS WEIGHT, CASES, ETC.	TARE CUTS.	NET QUANTITY OR MEASURE.
As entered Manifest Mines Spain		25433 Crates Oranges	Landed weights		
		weighed as follows:			
	50S	18444 Crates	846555	128416	718139
		Examination for decay shows decay to be 56 25/100 % of above			Landed weight
	72S	6484 Crates	286971	44739	242232
		Examination shows decay to be 48 6/10 % of above			Landed weight
	32S	505 Crates	23584	3567	20017
		Examination shows decay to be 49 23/100 % of above			Landed weight
Surplus Manifest Mines Spain		832 Half Cases Oranges	57335	8538	48797
		Examination shows decay to be 32 14/100 % of above			Landed weight

Tare, how obtained

Weight per bushel

I certify that the above is a correct statement of the record on file in this office.

NOTE.—If certificate is issued at request of importer a fee of 50 cents must be collected and charge of $2.15 made for work performed as prescribed in Art. 1103, C. R. 1923. Return must be made as soon as goods have been weighed, gauged, or measured.

3—8171

W R Bennett
Acting Deputy Surveyor of Customs.

[fol. 297] LIBELLANTS' EXHIBIT No. 11

December 5, 1925.

Mutual Lloyd Marine Corp'n, 15 Moore Street, New York, N. Y.

GENTLEMEN: We have the cargo of onions on the S.S. "Vallescura" now due.

Inasmuch as the weather is apt to become extremely cold at any moment, we hereby advise you to take proper precaution to protect the onions from freezing which would render them worthless and cause losses.

Awaiting to hear from you in this connection, we are

Very truly yours, H. Schnell & Co.

HS:LAE.

[fol. 298] LIBELLANTS' EXHIBIT No. 11a

Phone: Bowling Green 8604.
Cable Address: Mutualoyd.

Mutual Lloyd Marine Corporation, General Steamship Agents and Brokers, 15 Moore Street, New York, Decem. 7th, 1925.

Messrs. H. Schnell & Co., 323 Washington St., New York City.

S/S Vallescura—12/5/25

GENTLEMEN: In answer to your favor of Dec. 5th we beg to inform you that every precaution will be taken in order that the Onions should not be damaged from freezing, instructions to that effect being already given to the stevedore.

Very truly yours, Mutual Lloyd Marine Corporation, M. N. Giannoni, Sec'y.

MNG:FFF.

[fol. 299] LIBELLANTS' EXHIBIT No. 12

(Letterhead of H. Schnell & Co.)

December 12th, 1925.

Mutual Lloyd Marine Corporation, 15 Moore Street, New York City.

GENTLEMEN: We are the owner of the cargo shipped on the S/S "Vallescura", consisting of the following:

8,957 crates under Bill of Lading #10.
16,043 crates under Bill of Lading #4.
433 crates and 666 half cases under Bill of Lading #9.
766 half cases under Bill of Lading #5,

all of which goods arrived in New York in a damaged condition, due to the improper care and custody given to the cargo and for which we intend to hold the Steamship responsible.

We are, therefore, giving you this notice under paragraph 24 of the Bills of Lading abovementioned.

Very truly yours, H. Schnell & Co.

H. SCHNELL & CO.
Importers and Exporters
828 WASHINGTON ST.
NEW YORK, N. Y.

REGISTERED
RETURN RECEIPT REQUIRED

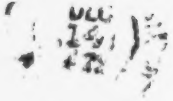
312307

RETURN RECEIPT REQUESTED
FEE PAID

Mutual Lloyd Marine Corporation

15 Moore Street

New York City









CLAIMANT'S EXHIBIT A 300-a

New York, _____ 19

Received in good order from on board the S. S. _____

_____ Master, from _____

the following packages, acc't _____

Cust No.	Number in Writing	Figures	Signature of Receiver
	9/109		
	N. Schnell, Co.		
		Ex. 4 U. S. Dist. Court S. D. of N. Y.	
	Bautista Manton		16.43
	Benjamin Benis		940 3
			25,446
	Jose Roman (25000 Cases		
	Bautista Manton Superior Queso Denia Spain (433 Cases (832 Half Cases		Queso.
	December 15 1925.		
R.S	3697 Three Hundred Cases	300	Lytton
"	4158 Three Hundred Cases	300	Lytton
/	3111 One Hundred + fifty Nine	159	San Francisco
Blain #9.	Four thousand nine (Hundred + Nineteen	4919	S. Mitchell
	Dec 16 1925		
R.S.	3710 Fifty Cases	50	Bowne
V	#15 Six Hundred Cases	600	Steamer
Paid #5.	Five Thousand + Fifty Two	5052	W. Brush
		11380	
		11380	

CLAIMANTS EXHIBIT B 300-b

New York, 19

Received in good order from on board the S. S.

Master, from

the following packages, acc't

Cart No.	Number in Writing	Figures	Signature of Receiver
	Half Cases		
	Dec 16 1925.		
R.S.	3695 Sixty Two Half Cases	62	Whitley
	Dec 16 1925		
Postal	Mark: 8 x 744783 Two Hundred 29.	200	Jas Smith
R.S.	3/10 One Hundred & fifty	150	Bonny
	Dec 17 1925		
R.S.	3697 One Hundred Ninety Two	192	[illegible]
	Dec 18 1925		
R.S.	3/00 Sixty Half Cases	60	J Parker
	Dec 19. 1925.		
R.S.	3696 One hundred and fifty one	151.	J Cooper
			Bl
91/109	B. N.	B/L 17	17
		832	
		Complete	

Ex. "B"
U. S. Dist. Court
S. D. of N. Y.

301

CLAIMANT'S EXHIBIT C

New York, _____ 19

Received in good order from on board the S. S. _____

_____ Master, from _____

the following packages, acc't _____

Can No.	Number in Writing	Figures	Signature of Receiver
	Crates	28	
Dec 17-1925	Canned Food	11380	
Ship # 67	Four Thousand Nine Hundred & Twenty	4920	S. Mitchell
	Dec 18 1925		
R.S 3700	Seventy five Crates	75	J. Locker
B&O 140	Eleven Hundred Cases	1100	J. Carbone
PRR 467	Five Hundred Cases	500	J. Carbone
- /	Seventy five Cases	75	J. Carbone
		1750	
	Dec 19/1925		
R.S 3696	Thirty Crates 72 size	30	J. Lester
N&W 2041	Six Hundred	600	J. Broncato
PRR 75	Six Hundred Cases	600	J. Broncato
		1765	
	Dec 21 1925		
R.S 3694	One Hundred & Eighty Cases	180	J. Lenca
NYC Billy Kenny	Eleven Hundred Cs	1100	J. Carbone
		1280	
R.S 3697	Two Hundred & Ninety-Eight	298	J. Kazmarsko
3710	Two Hundred & Eighty Eight	288	Kenny
N&W #75	Six Hundred Seventy five	675	J. Broncato
		2261	
		22356	

CLAIMANT'S EXHIBIT D 302

New York, _____ 19

Received in good order from on board the S. S. _____

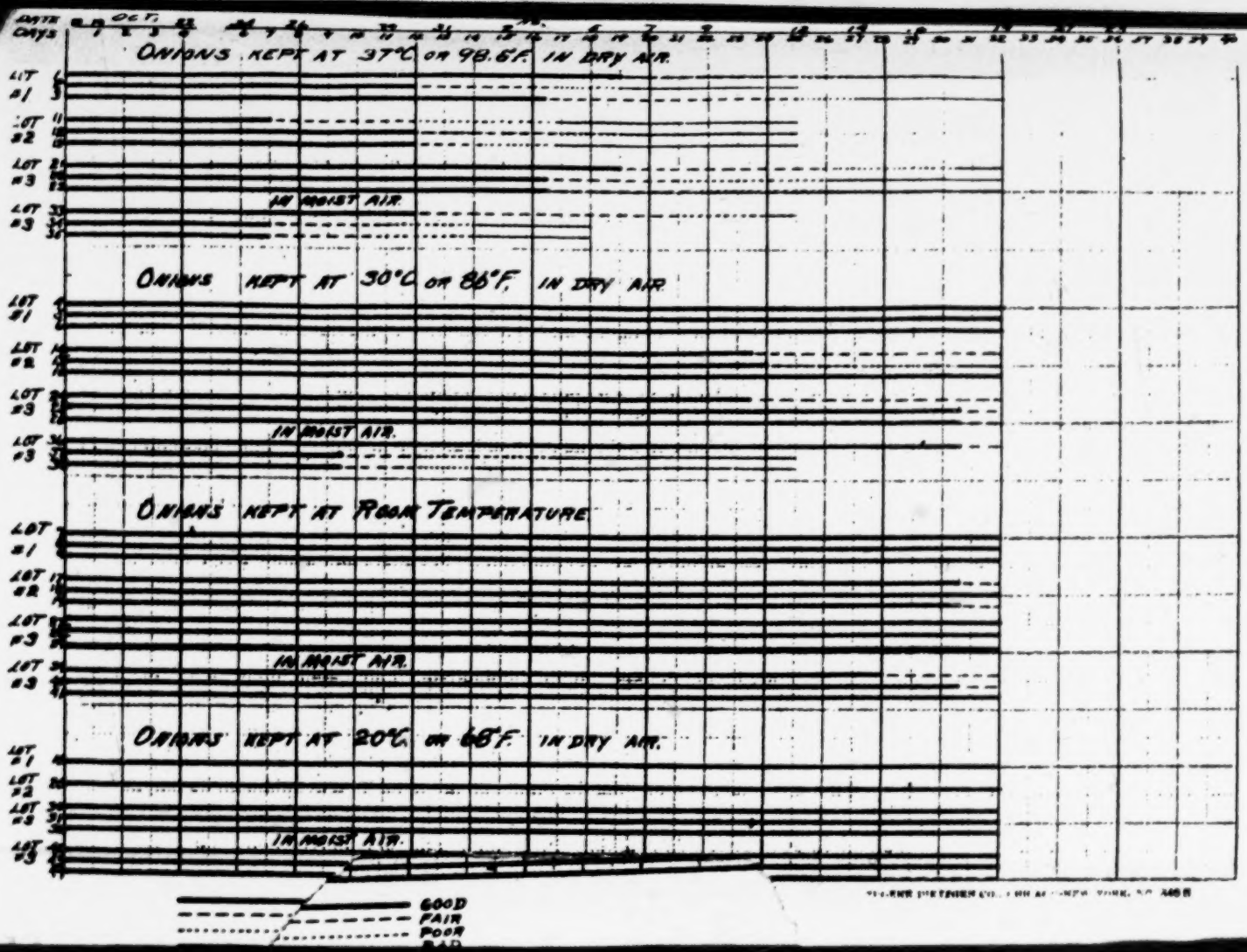
_____ Master, from _____

the following packages, etc't _____

Cart No.	Number in Writing	Figures	Signature of Receiver
	Carried Forward	22356	Cases.
	December 22 1925.		
H. Boot Hall	Three Thousand and Ninety Cases	3090	J. Brancati
	Seventeen Half Cases	17	J. Brancati
	Carried Forward	815	Cases
		26278	
		Complete	

"D"

S. D. of N. Y.
NOV - 1925

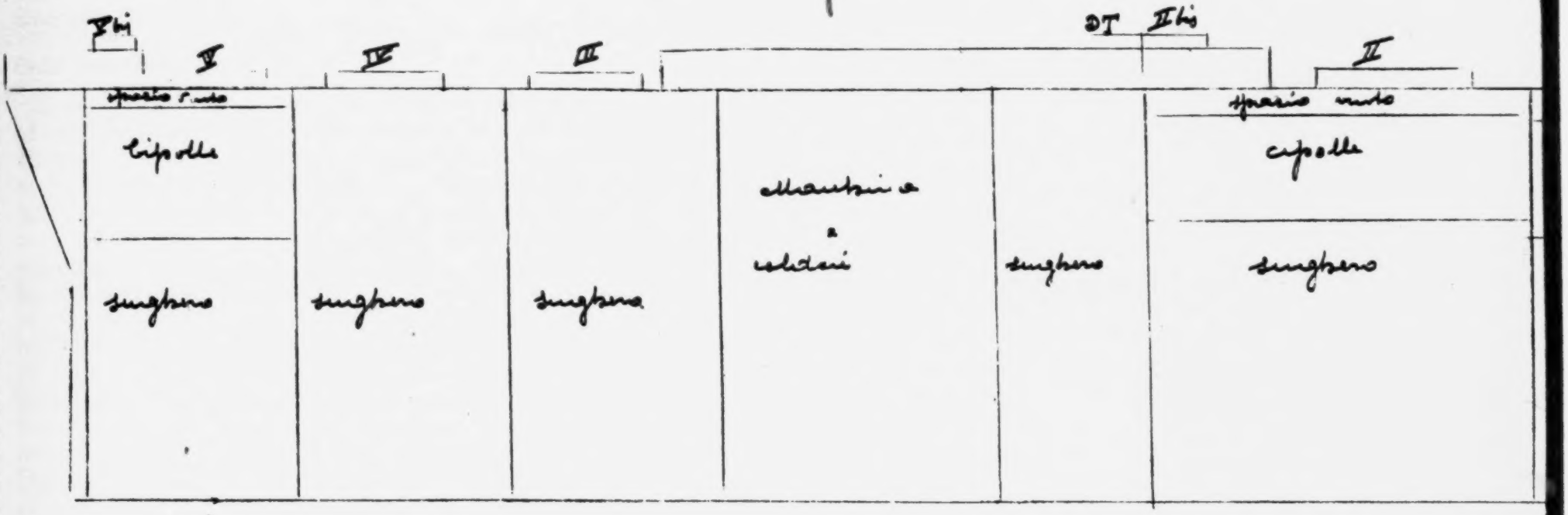


CLAIMANT'S EXHIBIT E

236
303-304

Prospetto Valletura

A 91/109



Dimensioni dello spazio occupato dalle cipolle — Spazio lasciato

Stiva I	lunghezza piedi	45	lunghezza	52	altezza	9	cubi pedi abici	21060	Stiva I spazio vuoto c
" II	"	50	"	61	"	8	"	26400	" II "
" IV	"	42	"	40	"	9	"	15120	" IV "

Translations: Spazio vuoto = Empty space
Cipolle = Onions
Sughero = Cork wood

Il Comandante
P. Delbeau

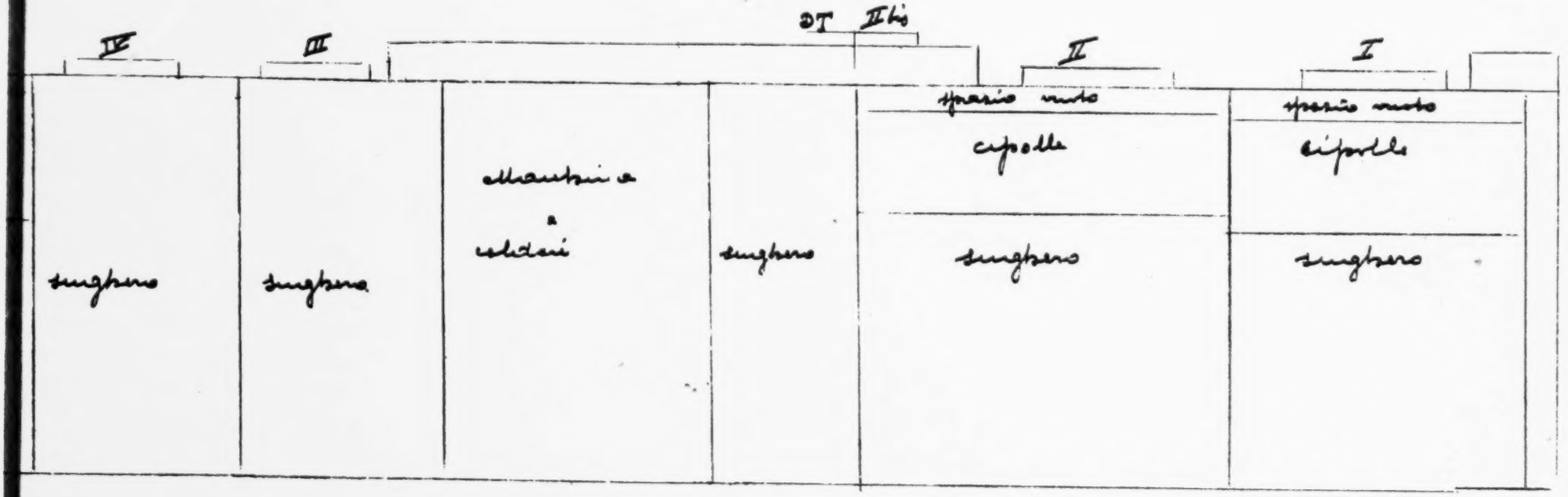
William L. Shockley
Commissioner

EXHIBIT 1

Piroscafo Vallescura

A 91/109

Exhibit No. 1.



dello spazio occupato dalle cipolle

piedi 45 lunghezza 52 altezza 9 cubi pedi cubici 21060
" 50 " 61 " 8 " 26400
" 42 " 40 " 9 " 15120

spazio lasciato vuoto attorno alle cipolle

Stiva I spazio vuoto circa 2500 piedi
" II " " 1500 "
" IV " " 1500 "

= Empty space

Il Comandante

Millicent E. Shorkley
Commissioner

R. Delbecq

R. S/S VALLESCURA

[fol. 307] CLAIMANT'S EXHIBIT No. 3

The United States of America

Protest

STATE OF NEW YORK,
City of New York,
County of New York, ss:

To all people to whom these presents shall come, or may concern, I, Michael P. Phelan, a Notary Public in and for the State of New York, County of Queens by Letters Patent, under the Great Seal of Said State, duly Commissioned and Sworn, dwelling in the City of New York, Borough of Queens

Send Greeting:

Know Ye, that the seventh day of December in the year of our Lord one thousand nine hundred twenty-five before Michael P. Phelan, a Notary Public in and for the State of New York, appeared B. Dulbecco, Master of the Italian S/S called the Vallescura, and noted in due form of law with the said Michael P. Phelan, a Notary Public duly commissioned and sworn, his Protest, for the uses and purposes hereafter mentioned, and now at this day, to wit, the day of the date hereof, before me, at the City of New York, Borough of Manhattan, aforesaid. again comes the said B. Dulbecco, Master Italian S/S Vallescura and requires me to extend his protest, and together with the said B. Dulbecco also come Mate, Chief Engineer and one Seaman belonging to the aforesaid S/S Vallescura all of whom [fol. 308] being by me duly sworn on the Holy Evangelists of Almighty God, voluntarily, freely, and solemnly do declare and depose as follows, that is to say, that thirtieth day of October in the year of Our Lord One Thousand Nine Hundred Twenty-five, he the said B. Dulbecco set sail and departed in and with the said S/S Vallescura as Master thereof from San Feliu, Italy, having on board the said S/S Vallescura a cargo of General Merchandise and bound for the Port of New York, that the said S/S Vallescura was then stout, staunch and strong; had her cargo well and sufficiently stowed and secured; was well mastered, manned,

tackled, victualed, appareled and appointed, and was in ever respect fit for sea and the voyage she was about to undertake, and did encounter very heavy weather as per abstract of logbook attached.

Abstract of the Log Book Part I—of the S/S Vallescura, of Italian Flag 3071 Registered Tons—Registered at #1098 in the Port of Genoa

From Page 6 and following reads:

Nov. 17—Fresh breeze from W.—In order to keep the holds where the Onions are, well ventilated, we keep the hatches open daily closing them at night.

Nov. 18/20—Good weather and variable winds.

Nov. 25—Variable weather—The Onions are constantly kept well ventilated.

Nov. 26—Fresh breeze from WNW with heavy showers—Heavy sea—Strong movements of rolling and pitching.

[fol. 309] Nov. 27—Wind of violent strength, heavy sea with high waves that breaks on deck violently—Although the cork on deck has been properly stowed, owing to the heavy rolling and pitching of the steamer, it is believed that some bales may have been washed overboard. When it is possible we try the bilges, and found a quantity of water superior to normal. Orders are given to start the pumps, and this is done between 9 and 12. Owing to the heavy sea breaking on deck it is believed that water has penetrated into the holds somehow, damaging the cargo.

The wind and sea continues to be very strong obstructing the speed of the steamer, which is suffering very heavy strain, owing to the vibrations from rolling and pitching, either to the hull as to the steering.

The Master, Sgd. Dulbecco.

New York, Dec. 7th, 1925.

William P. Shockley, Commissioner.

And the said B. Dulbecco, further says that, as all the damage and injury which already has, or may hereafter appear to have, happened or accrued to the said S/S Vallescura or her said cargo, has been occasioned solely by the circumstances hereinbefore stated, and cannot nor ought [fol. 310] not to be attributed to any insufficiency of the

said B. Dulbecco or default of him, this deponent, his officers or crew, he now requires me, the said Notary, to make his Protest and this public act thereof, that the same may serve and be of full force and value, as of right shall appertain.

And thereupon the said B. Dulbecco doth protest, and I, the said Notary, at his special instance and request, do by these Presents publicly and solemnly protest against winds, weather and seas, and against all and every accident, matter and thing had and met with as aforesaid, whereby, or by means whereof, the said S/S Vallescura or her cargo already has, or hereafter shall appear to have suffered or sustained damage or injury, for all losses, costs, charges, expenses, damages and injury which the said Captain, the owner or owners of the said S/S Vallescura or the owners, freighters or shippers of her said cargo, or any other person or persons interested or concerned in either, already have or may hereafter pay, sustain, incur or be put unto, by or on account of the premises, or for which the insurer or insurers of the said S/S Vallescura or her cargo, is or are respectively liable to pay or make contribution or average according to custom, or their respective contracts or obligations, and that no part of such losses and expenses already incurred, or hereafter to be incurred, do fall on him, the said B. Dulbecco, his officers and crew.

Thus done and protested in the City of New York, Borough of Manhattan, this seventh day of December in the [fol. 311] year of our Lord one thousand nine hundred twenty-five.

In testimony whereof, as well the said appearer, as I, the Notary, have subscribed these Presents, and I have also caused my Seal of Office to be hereunto affixed, the day and year last above written.

B. Dulbecco, Captain. S. Irrera, Mate. Illegible, Engineer. Illegible, Seaman.

Michael P. Phelan, Notary Public. (Seal.)

ss:

I, Michael P. Phelan, a Notary Public in and for said State duly commissioned and sworn, dwelling in the City of New York, do hereby certify the foregoing to be a true

and exact copy of an Original Protest on record in my office, 44 Whitehall St.

In testimony whereof, I have hereunto set my hand and Notarial Seal this seventh day of December, one thousand nine hundred twenty-five.

Michael P. Phelan, Notary Public. (Seal.)

[fol. 312] CLAIMANT'S EXHIBIT No. 4

Page No. 5

Permanence at Palamos

Oct. 31st—At 8 am. we start loading working until — stopping owing to rain.

Nov. 1st—Holiday—Not working.

Nov. 2nd—Working all day.

Nov. 3rd—We finish loading at about 4 pm. At 4.30 with the pilot on board we unmoor and at 5.05 we are out of the harbor proceeding at full speed.

Nov. 4th—Proceeding with fine weather. At 6.30 pm. we anchor in the bay of Gandia.

The Master, Sgd. B. Dulbecco.

Seen at the Royal Consul Agency of Italy without declaration of average.

Gandia Nov. 5th 1925.

The R. Consular Agent, Sgd. —— ——.

Permanence at Gandia

Nov. 5th—We load all day. At 5.10 pm. ready, we sail for Denia. At 7.10 pm. we anchor in the Bay of Denia.

The Master, Sgd. B. Dulbecco.

Seen at the arrival without average declaration.

Denia, Nov. 7, 1925.

The R. Consul Agent of Italy, Sgd. E. Cosmelli.

Permanence at Denia

Nov. 6th—Owing to bad weather we are not working.

[fol. 313] Nov. 7th—At 4 pm. weather permitting, we start loading working until 8 pm.

Nov. 8th—Sunday—Not working.

Nov. 9/10—Owing to bad weather we are not working.

Nov. 11th—At 2 pm. we start loading working until 8 pm.

Nov. 12th—Being impossible to load owing to bad weather at 11.25 we start sailing and at 12 we have engines at full speed.

Accident Declaration

Seaman Pieruzzini Francesco, on the 10th at 6 pm. while going forward crossing on top of the cork on deck, slipped and fell hitting with his left side and with right leg against a bale of cork, producing escoriations on both sides.

Witness: Boatswain Merani Luigi.

Seaman: Catanzaro Umberto.

On top of each hatch were laid three tarpaulins.

Bad weather—fresh wind from N. E. agitated sea. Heavy showers at intervals. At 8 pm. the weather is clearing-Across-Cape Palos, at 10 pm.

Nov. 13th—Better weather—at 11.40 am. across Point Sabinol, distance of 8 miles. At midnight we order engine at half speed.

[fol. 314] Nov. 14th—At 7.45 am. we get the pilot and at 8.20 we are moored.

The Master, Sgd. B. Dulbecco.

Seen in this Royal Consulate of Italy without declaration of average.

Gibraltar, Nov. 14th, 1925.

The R. General Consul, Sgd. Goffredo, S/S Vallescura.

Page 6

Voyage from Gibraltar to New York

Nov. 14—At 6 pm. ready we sail. At 7 pm. right out of the harbor, the Chief Engineer informs me being impossible to proceed owing to the breaking of various boilers' tubes (left). We anchor in the bay.

Nov. 15—Anchored—Working on repairing the boiler.

Nov. 16—At 5 am. we sail and at 5.20 at full speed.

Nov. 17—Fresh breeze from W.—In order to keep the

holds where the onions are stowed, well ventilated, we keep the hatches open daily, closing them at nigth.

Nov. 18/19—

Nov. 20/21—Good weather—variable winds.

Variable weather—Fireman Fernandes Costantino being affected by venereal disease, from today is out of duty. Fireman Vozzo Rocco at 10 pm. went to close a door that [fol. 315] was slamming, and had the two fingers of the left hand between the door, causing ebrasions to the 2 fingers. Witnesses: Fireman Repetto Orlando and Del-Bene Armando.

Nov. 22—Fresh breeze from ENE.—We are rolling heavily.

Nov. 23/24—Fresh Wind from ENE.—rolling continues.

Nov. 26—Fresh breeze from NWN. with heavy showers, heavy sea, strong movements of rolling and pitching.

Nov. 27—Wind of violent force—High sea that breaks on deck violently. Although the cork on deck is properly stowed, owing to the heavy rolling we believe that some bales could have been washed overboard during the rolling. When possible we try the bilges and we find a quantity of water superior to normal, orders are given to start the pumps and this is done between 9 and 12M.—Owing to the heavy sea breaking on deck we doubt that water may have penetrated somehow into the holds, therefore damaging the cargo.

Wind and sea continue to be strong and heavy, delaying the speed of the steamer, which is suffering for the violence of rolling, the strong vibrations to the hull and to the steering gear. Fireman Fernandes Costantino resume duty.

Nov. 28—The weather towards evening seems to improve.

[fol. 316] Nov. 29—Again fresh breeze from N. to NE.

Nov. 30—Showers—Agitated sea.

Dec. 1—Strong wind from NE. Sea very heavy breaking on deck. Strong movements of rolling and pitching.

Dec. 2—Continues heavy sea and strong wind from NE.—Heavy showers. Owing to the rolling and pitching of the steamer the engine is terribly strained.

Dec. 3—Continues same weather as in the previous day. Chief Engineer reports: At 10 pm. of the 2nd of December during the bad weather from an examination was found:

Serious cracking with heavy leak to the circulating pump (leak that heavily handicapped the regular motion of the engine).

Sensible heating to the shoe M. A. of low pressure.

Sensible heating of the bearings of the transmission shaft "tunnel".

Stripping of threading of piston rod from its respective connection with the Wier Pump p. p. Fracture of Weir pump feed pipe.

Breaking of flooring boilers' room.

Falling of the donkey boiler insulation.

I make reservation to state eventual damages to the generator Motor & auxiliaries after a detailed examination to same.

Dec. 4—Heavy fog—We are blowing the whistle at regular intervals.

Dec. 4th— — sounding often, we proceed at reduced [fol. 317] speed. At 10.30 pm. at one mile distance, we can see the Ship-Light of Ambrose. At 11.30 at half mile distance from Ambrose—Owing to the fog we stop, considering unsafe to proceed.

Dec. 5th—In the morning at 7.40 weather little clearer, we proceed at 8.20 we get the pilot and at 10 we arrive at Quarantine. From 10 to 12, anchored for the "pratique" then we proceed. At 1 pm. we are moored at Pier 3 Staten Island.

The Master, Sgd. B. Dulbecco.

New York, Decem. 5th, 1925.

Seen with declaration of probable average to the cargo and with declaration of engine troubles.

New York Dec. 12th, 1925.

The Vice Consul, —— ——, (Sgd.) —— ——.

Royal Italian General Consulate at New York:

I beg to state to your goodselves that on the 5th inst., during the evening, two seamen Fosco Giovanni and Mastiocolo Cammillo, were missed from board, and together with them their own personal effects and 4 blankets of wool, were also missing.

I make reservation to debit to said seamen all those expenses encountered for their substitution.

[fol. 318] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 91-109.

HARRY SCHNELL and SAMUEL SCHNELL, Co-partners, Doing Business as H. Schnell & Co., Libellants,

against

S/S. "VALLESCURA", Her Engines, Boilers, etc., Respondent; LLOYD MEDITERRANEO, Claimant

In Admiralty

Libel in rem for recovery of damage to onions shipped in the month of November, 1925, per S/S. Vallescura, from the Ports of Gandia and Denia, Spain, to the Port of New York, where the vessel arrived on Saturday, December 5, 1925, and commenced discharge on Monday, December 7th.

Libellants are the holders of three bills of lading covering these shipments, each of which acknowledges shipment "in apparent good order and condition", to be delivered "in the like apparent good order and condition", subject to the terms, conditions and exemptions from liability printed on the bill of lading. Among the conditions are the following:

[fol. 319] "Weight, Measurement, Gauge, Contents, Quality, Condition, Brand and Value unknown, and not accountable for loss or damage resulting from stowage, sweating, * * * decay * * *, effect of climate or heat of hold, * * * deterioration in quality, defects", etc., etc.

These bills of lading also contain the following notice clause:

"Notice of any claim arising under this Bill of Lading, must be given by the consignee to the Steamer's Agent at the Port of Destination, within 48 hours after the landing of, or failure to deliver goods, and the claim to be referred within ninety days from the date hereof at the offices of the owner of the steamer."

Joffe & Joffe, Proctors for Libellants (Joseph Joffe, of Counsel). Loomis & Ruebush, Proctors for Claimant and Respondent (Homer L. Loomis, of Counsel).

OPINION

THACHER, D. J.:

Non-compliance with the notice of claim clause is relied on in defense. The cargo of onions was completely discharged not later than Tuesday, December 8th, 1925. Written notice of claim was given December 12, 1925, obviously too late,—but notice of claim was given by telephone to the ship's agents on the day when the discharge began, and by one of the libellants in person a day or two [fol. 320] later, which was within forty-eight hours after the landing of the shipment. This was sufficient compliance.

The words "shipped in apparent good order and condition", "to be delivered in like apparent good order and condition", import an admission that the cases when shipped were so far as could be seen in good order, and the onions so far as visible were not damaged. More than this the owners did not represent. (The Bencleuch, 10 Fed. 2d 49, 52; C. C. A. 2.) The onus upon the ship owner is met by proof either that the damage did not arise during shipment or that it was within the exceptions of the bill of lading. Apparently good when shipped, the onions were in an advanced stage of decay when delivered, and it is for this that recovery is sought. Thus, the very nature of the injury shows the damage to be prima facie within the exception, and the burden rests upon the shipper to prove the carrier's negligence in order to escape the exception. (The Folmina, 212 U. S. 354, 362; Florinda, 1929 A. M. C. 417, C. C. A. 2; The Toyohashi Maru, 13 Fed. 2d, 871, C. C. A. 2; The Bencleuch, supra.)

As to the stowage, no fault is to be found. Considering the manner in which the crates were stowed sufficient passages were left for the circulation of air through and around the pack. The uniformity of damage throughout the stow indicates that the fault was not in stowage, but in failing to ventilate the holds sufficiently during the course of the voyage. As to this the Master testified that the ventilators and hatches were at all times closed when the weather was bad, but when the weather permitted were left [fol. 321] open, and were always open during fair weather. But on cross examination he testified:

"Q. State whether you placed covers over your ventilators (a) At any time, (b) Give day and time of day for each placing and removal.

"A. In good weather I opened the ventilators in the daytime and closed them at night, and in bad weather the ventilators were kept closed at all times."

There is an entry on the Log, under date of November 17th, as follows:

"Fresh breeze from W. In order to keep the holds, where the onions are, well ventilated we keep the hatches open daily, closing them at night."

Thus it appears that this notoriously perishable cargo of Spanish Onions (The Buckleigh, 1929 A. M. C. 449, 450) was deprived of all ventilation during the nighttime, regardless of the state of the weather. Such treatment was obviously ruinous, and must have caused substantial damage.

I am asked to disregard the Master's testimony with reference to closing the ventilators at night, as a mistranslation of his answer. Obviously there is no reason or justification for so doing, particularly in view of the entry upon the Log with reference to the hatches. Nor can I reject his statement as improbable. If it had been shown that he had had much experience in carrying such cargoes, his admission of fault would perhaps seem improbable, but [fol. 322] it does not appear that he had had any prior experience—certainly none in the trade in which he was engaged—in carrying onion cargoes. Accepting his testimony, as I must, negligence in the care and custody of the cargo is established. It may be that considerable damage resulted to this cargo from lack of ventilation during periods of the voyage when weather conditions required the closing of hatches and ventilators. If this be true difficulties of proof may arise. But this should not defeat the recovery of such damage as was caused by closing the hatches and ventilators at night during good weather.

Enter decree accordingly, with provision for reference to determine the amount of damage recoverable.

April 24th, 1929.

(Sgd.) T. D. Thacher, U. S. D. J.

[fol. 323] IN UNITED STATES DISTRICT COURT

91-109

HARRY SCHNELL and SAMUEL SCHNELL, Co-partners, doing business as H. SCHNELL & Co., Libellants,

against

The s/s VALLESCURA, Her Engines, Boilers, etc., LLOYD MEDITERRANEO, Claimant

INTERLOCUTORY DECREE—April 26, 1929

This cause having duly come on to be heard upon the pleadings and proof adduced by the respective parties and having been argued and submitted by the respective advocates, and due deliberation having been had thereon, and the Court having rendered its decision in writing holding that the libellants should recover only such damages as was caused by closing the hatches and ventilators of the vessel at night during good weather and no other damage, [fol. 324] Now, on motion, it is

Ordered, adjudged and decreed that the libellants recover from the steamship Vallescura, her engines, boilers, &c., and her claimant, such damage sustained by it as was caused by closing the hatches and ventilators of the vessel at night during good weather, together with its costs; and it is further

Ordered, adjudged and decreed that the libellants do not recover of and from the steamship Vallescura, her engines, boilers, &c., and the claimant, any damages sustained by it, except such damage as was caused by closing the hatches and ventilators of the vessel at night during good weather; and it is further

Ordered that this cause be referred to William Parkin, Esq., a Special Commissioner, to ascertain and compute the amount of the libellants' damages and report thereon to this Court with all convenient speed.

T. D. Thacher, U. S. D. J.

[fol. 325] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

HARRY SCHNELL and SAMUEL SCHNELL, Co-partners, doing business as H. SCHNELL & Co., Libellants,

against

S.S. VALLESCURA, Respondent, LLOYD MEDITERRANEO, Claimant

Statement of Evidence

HEARING BEFORE SPECIAL COMMISSIONER

Before William Parkin, Esq., Special Commissioner

Hearing held at the office of the Special Commissioner, in the Post Office Building, Park Row, New York City, October 21st, 1931.

Appearances:

William Parkin, Esq., Special Commissioner.
Messrs. Joffe & Joffe (Mr. Joseph Joffe) for the Libellants.
Messrs. Loomis & Ruebush (Mr. Loomis) for Claimant and Respondent.

COLLOQUY

Mr. Loomis: If I may be permitted to speak of the subject now, I think you will be greatly expedited in your consideration of this case, which is a most exceptional one, if [fol. 326] you read the interlocutory decree.

The Commissioner: I have read the decree and the opinion both.

Mr. Loomis: If I may state—Mr. Joffe apparently doesn't intend to make an opening, but I should like to be permitted to make one or two remarks in this connection.

The Commissioner: All right.

Mr. Loomis: The interlocutory decree was entered in this case almost two years ago, and I assumed because of the nature of the interlocutory decree that no effort would be made to prove damages in this case because of the practical impossibility of proving any. The facts that the Court

found were substantially as follows: That the onions here in question were seriously damaged when they arrived on this side; that the stowage was proper and the custody and keeping of the merchandise was proper, except that the Court found from the captain's testimony, and which I contended contained an error—a typographical error—it did find that on one or two occasions the master had closed the hatches and ventilators in good weather. The Court in its interlocutory decree found that the only damage for which the carrier could be responsible in any event would be the damage resulting from those one or two occasions on which the hatches and ventilators had been closed, pointing out the length of the voyage and the entire period during which the hatches and ventilators had had to be closed because of the bad weather—I think there were perhaps two weeks or so of the entire period in which the ventilators and hatches had to be closed because of bad weather. [fol. 327] The Court held and ruled in its interlocutory degree that for none of that damage caused by the hatches and ventilators having been closed in bad weather was the ship responsible, but only for that portion of the damage which was caused by the closing of the hatches and ventilators in good weather, so that I take it that the proofs to be produced here by Mr. Joffe now are as to the amount of the damage—the part of damage that was caused by the closing of the hatches on those occasions in which they were closed in good weather.

Mr. Joffe: In view of the decisions of the Circuit Court of Appeals and others, I will prove the entire damage, and the burden of showing what damage was not caused will be on Mr. Loomis' client, that is one of the reasons why I was very careful to prepare a memorandum of law in this case.

Mr. Loomis: In answer to that, let me say I don't know what authorities Mr. Joffe is relying on, but my impression is that the authorities he is relying on are authorities under which the interlocutory decree allows the damage alleged in the libel or complaint. In this case it does not, it specifically provides he is entitled only to damages caused by the closing of hatches and ventilators in good weather. The interlocutory decree expressly provides he shall not recover for any damages other than those caused by the closing of the hatches and ventilators on those few occasions in which they were closed in good weather.

Mr. Joffe: I suppose we are entirely ahead of time discussing the law, no decree whatever could grant us more than we are entitled to.

[fol. 328] Mr. Loomis: The decree reads as follows: The interlocutory decree—I take it that the Commissioner is bound to respect the interlocutory decree and cannot disregard it, no matter how much Mr. Joffe would like to have him do so. This is the recital: The Court having rendered its decision in writing holding that the libellants should recover only such damage as was caused by closing the hatches and ventilators of the vessel at night during good weather, and no other damage—then going on, ordering, now on motion it is ordered, adjudged and decreed, that the libellants recover, etc., such damage sustained by it as was caused by closing the hatches and ventilators of the vessel at night during good weather. It is further ordered, adjudged and decreed that the libellants do not recover of and from the steamship Vallescura, etc., any other damages sustained by it except such damage as was caused by closing the hatches and ventilators of the vessel at night during good weather. Now, the issue here, it seems to me is perfectly clean cut, the libellant who has the burden of proof, who has the burden under this bill of lading of proving negligence, because the bill of lading expressly excepted damage resulting from the want of ventilators, and heating of the holds—under the circumstances the libellant who has the burden of proving negligence must prove affirmatively in this case that the damage that he is seeking here to recover is damage caused by the negligent act that the Court found—the only one that the Court found—to wit, the closing of the hatches and ventilators in good weather, that he must prove, he cannot come in here——

The Commissioner: I think we had better wait

Mr. Loomis: He has already indicated that he intends to offer here general proof, if he does that I shall have to object at the outset to the entire line of testimony.

The Commissioner: He has to prove the amount at all events. Go ahead, Mr. Joffe.

Mr. Joffe: May I at the outset state that I do not want to take issues with Mr. Loomis as to a statement of facts as to when the hatches were closed or open, but the record is complete on that, and the Court has ruled.

The Commissioner: The logbook shows?

Mr. Joffe: No, the testimony of the captain was that it was closed every night. I assume Mr. Loomis it is conceded—it is conceded in your pleadings that there were shipped on this steamer 25,433 crates and 832 half cases.

Mr. Loomis: I am making no concessions except what the record shows.

The Commissioner: The bills of lading are in evidence.

HARRY SCHNELL, being duly sworn and examined as a witness for the libellants, testified as follows:

Direct examination.

By Mr. Joffe:

Q. Mr. Schnell, you are one of the plaintiffs in this action?

A. Yes.

Q. You are a member of the firm of H. Schnell & Co.?

A. Yes.

[fol. 330] Q. Consisting of yourself and your brother, Samuel Schnell, partners?

A. Yes, sir.

Q. Did you have a cargo of onions on the steamer Vallescura?

A. Yes, sir.

Q. Do you recall when the steamer arrived in this port?

A. I have to refer to memorandum.

The Commissioner: Does not all that appear?

Mr. Joffe: Yes.

Q. How long have you been in the business of selling and buying onions in this City?

Mr. Loomis: That is all in the record.

A. Over seventeen years.

Q. Were you buying and selling onions during the year 1925 and 1926 in the City of New York?

A. Yes, sir.

Q. Are you acquainted with the market price of Spanish onions in the City of New York?

A. Yes, sir.

Q. Between the dates of December 1st, 1925 and January 20th, 1926?

A. Yes, sir.

Q. Was the price the same during all that time?

A. Yes, sir.

Q. Will you tell us what is known in the market by a crate of Spanish onions.

Mr. Loomis: That is all in the record.

Mr. Joffe: That is just for the information of the Special Commissioner.

A. Yes.

Q. Tell us what it is, what is a crate?

A. A crate consists of 40 pounds of onions 50 to a crate and 72 to a crate a little smaller than the 50s, the 72s. The [fol. 331] 50s are separately packed and the 72s are separately packed.

Q. When there are 72 onions to a crate they are smaller onions, is that right?

A. Smaller onions.

Q. And 50 to a crate they are larger onions?

A. Larger onions.

Q. They weigh about the same?

A. Weigh about the same, the same weight.

Q. How about half cases?

A. Half cases weigh 66 pounds, 120 onions to a half case and 200 onions to a half case, which are smaller than the 120.

Q. Can you tell us what was the market price for Spanish onions per crate in the port of New York between December 1st, 1925 and January 20th, 1926?

Mr. Loomis: I object to that on the ground that the witness has not been properly qualified; also on the ground that it is common knowledge of which the Court will take judicial notice, that onions are sold at auction here when they arrive in the port of New York. There is no established market value. The witness should not be permitted to call any other market value when we all know it isn't market value, that it is the price which is received for onions at any time, which is only that resulting from auction sales.

The Commissioner: Bring out the facts.

Q. Have you sold and purchased onions daily during the periods I mentioned?

A. Yes, sir.

Q. And the prices of onions are known in the market [fol. 332] among traders?

A. Known in the market and throughout the country.

Q. Are they published in newspapers every day?

A. Yes, they are.

Q. Among the newspapers what paper do you know which publishes the daily prices on Spanish onions?

A. Current Events, the Journal of Commerce and a number of other papers—the World used to have it.

Q. The Times has it?

A. I don't know about the Times, but the World, the Journal of Commerce, Current Events and other local papers.

By the Commissioner:

Q. Which papers are recognized in the trade as containing the market prices?

A. The Journal of Commerce, as well as Current Events.

By Mr. Joffe:

Q. Are onions sold at public auction at the same time?

A. Very rarely.

Q. Do you sell your onions at public auction?

A. Never.

Q. To what extent did your firm import onions during the year 1925-1926?

A. Three-quarters of a million packages.

Q. Taking into consideration the total importation of Spanish onions from Spain to the United States, what portion of that importation does your firm receive in this country?

A. Over 75 per cent.

Q. Could you tell us from your experience, Mr. Schnell, and knowledge of the trade, what percentage of the total [fol. 333] importation of Spanish onions into this country were sold at public auction?

A. Less than 1 per cent.

Q. Now, Spanish onions during the period stated by me,

between December 1st, 1925 and January 20th, 1926, were sold in the port of New York and City of New York by other merchants than yourself?

A. Yes.

Q. And the prices for these onions were the same, weren't they?

Mr. Loomis: Do not lead the witness.

The Commissioner: Don't lead him.

Q. What were the prices quoted by the different merchants in the City of New York for Spanish onions?

A. The average price 87 cents per crate.

Q. How far did that swing, will you tell us?

A. From 75 cents to $1.00.

Q. Was that the average price received by all of the merchants in the City of New York at that time?

A. Yes, sir.

Q. And was that the price which your firm received for the onions which they sold?

A. Yes.

Q. Now, what was the market price for the half cases of Spanish onions during the same time?

A. Those that I had were sold for $1.35 per half case.

Mr. Loomis: I object to the answer and ask that it be stricken out because the question was what was the market value of half cases at that time, and the witness answered saying I sold mine at $1.35.

The Witness: I said those that I sold at $1.35, five tiers.

Motion denied.

Exception.

[fol. 334] A. (Continuing.) Four tiers sold for $1.50, which was 120 to a half case.

Mr. Loomis: I submit that that should be stricken out, he was asked what the market value was.

Motion denied.

Mr. Loomis: I object, I understand your Honor has overruled it?

The Commissioner: Yes.

Exception.

Q. The 832 half cases which your firm received on the steamship Vallescura, what tiers of onions were they?

A. 5 tiers.

Q. The 5 tiers consist of small or large onions?

A. Small, 200 to a half case.

Q. What was the market price of 5 tier onions in the City of New York at that time, the time I mentioned before?

A. $1.35 per half case.

Q. Will you please figure for us the 25,433 cases at 87 cents and let us know what was the total value of the cargo of crates on the steamship Vallescura at that price.

Mr. Loomis: I object, that is a mere matter of computation.

Mr. Joffe: Do you want me to state that?

The Commissioner: If Mr. Schnell has made the computation, he can state what it is.

Overruled.

Exception.

Mr. Loomis: I object further on the ground that it does [fol. 335] not appear what quantity of half cases there were. Counsel has stated that there were a certain number but I don't recall that there was any testimony.

The Commissioner: Does not that appear in the record?

Mr. Joffe: Yes, both admitted in the pleadings, and the bills of lading are in evidence.

The Commissioner: If the record is not complete it can be made so.

A. Crates 25,433 at 87 cents, $22,126.71. Half cases 832, $1,123.20.

Q. Or a total——

A. Or a total of $23,249.91.

Q. Will you please tell us when you gave us the quotation of 87 cents for a crate and $1.35 for a half case, what merchandise did you have in mind speaking of Spanish onions in crates and half cases?

Mr. Loomis: I object to that question, the answer that the witness gave is plain on its face.

The Commissioner: I suppose you mean sound or damaged onions?

Mr. Joffe: That is right.

Mr. Loomis: I have no objection then.

A. Sound onions.

Q. Now, will you please tell us, Mr. Schnell, to put the cargo which you received on the steamship Vallescura in that condition as you say, sound onions, what you had to do?

Mr. Loomis: I object to that, either it is wholly unintelligible or it is asking this witness what should be done abroad when the cargo was shipped in order to get it on [fol. 336] the ship.

The Commissioner: I assume Mr. Schnell knows the conditions.

Q. Will you please tell us in what condition did the onions arrive on the Vallescura in the port of New York.

A. Arrived in a very rotten condition.

Q. Will you describe for us, instead of using the conclusion rotten, please describe the condition of the onions.

A. The onions arrived heated.

Mr. Loomis: I object to that. I am not objecting, Mr. Commissioner, to anything that he saw, but I am objecting to his volunteering what he thinks was the cause of that condition.

The Commissioner: Did you see the onions on their arrival?

The Witness: Yes.

The Commissioner: What was their condition?

The Witness: Very bad.

Q. Will you please tell us, Mr. Schnell, was that cargo examined by the United States Customs service?

A. Yes, sir.

Q. And the report of the United States Custom House service has been made with reference to the condition of the onions?

A. Yes.

Q. I show you Exhibit 9 and ask you whether that has reference to the onions arriving on the Vallescura?

A. Yes, sir.

Mr. Joffe: I now call the attention of the Commissioner to the Department of Health certificate showing condemnation of 3090 crates and 17 half cases, Exhibit 7 in evidence [fol. 337] in the United States Court.

Q. What was done with the cargo of onions that arrived on the steamship Vallescura, Mr. Schnell?

A. The cargo was discharged on the pier.

Q. Yes.

A. And we notified the steamship company of their condition, and then we had a number of men to repack part of the cargo on the pier and we learned that it was going to be cold weather, we removed the balance of the cargo to a warehouse to save it from freezing, that pier was in a very poor condition, a very old pier.

Mr. Loomis: I object and ask that it be stricken out.

Overruled.

Exception.

Q. What portion was repacked on the pier, Mr. Schnell?

A. Repacked on the pier, 8979 crates.

Q. Yes.

A. Lost bad onions 3090 crates.

Q. How many half cases were repacked on the pier, if any?

A. None, but we lost 17 halves that were completely worthless.

Q. The ones that were lost that you mentioned were condemned by the Board of Health?

A. Condemned by the Board of Health.

Q. That is the certificate which I referred to the Commissioner, is that correct?

A. Yes.

Q. What was done with the balance?

A. We removed 1563 crates to our store, 323 Washington Street, and 14,891 crates to a storage house in Staten Island, I believe—the Standard Milling.

[fol. 338] Q. The Standard Milling warehouse in Jersey City?

A. Yes, sir; Jersey City.

Q. What did you do with the half cases?

A. We removed them to the store. We repacked and lost 215 halves. 15,063 crates we repacked and lost 374 crates. In the storehouse we repacked 14,891 crates and lost 3272 crates.

Q. Now, was it possible to sell the onions in the condition in which they arrived in the port of New York on the steamship Vallescura without repacking?

A. It was not, it was impossible.
Q. It was impossible, you say?
A. It was impossible.
Q. Onions are never sold that way in the port of New York?

Mr. Loomis: Please don't lead the witness.
The Commissioner: Yes, don't lead him.

A. Cannot be sold.
Q. Of your experience in this onion market, I want to know whether there is a Board of Health in the State of New Jersey that passes upon the condition of the onions?

Mr. Loomis: That is a question of law, this witness is not qualified to answer.

Q. (Continuing:) At that time, 1925-1926?

The Commissioner: I will take it.

Exception.

A. Yes, sir, there is, they are right there every perishable cargo that is on the pier.
[fol. 339] Q. In New Jersey?
A. In New Jersey, they come on the pier the minute a perishable cargo is ready to commence discharging.
Q. Do they issue any certificates of condemnation in the State of New Jersey?

Mr. Loomis: I object to it.

Overruled.
Exception.

A. Yes, sir.
Q. I show you these bills of the Standard Milling Warehouse Corporation, and ask you whether they cover the warehousing of the Spanish onions that you mentioned in your testimony?
A. Yes, sir.

Mr. Joffe: I ask that they be marked for identification.

(They are marked Libellants' Exhibits 1, 2 and 3 for Identification.)

Q. Now, will you please figure for us the exact amount—as you testified—of the crates which you sold and the half

cases which you sold, and the moneys you received upon the sale thereof?

Mr. Loomis: I make the same objection again, on the ground that this is a mere computation, there is no reason——

The Commissioner: There is no reason why the witness should not save the Court the trouble of making the computation.

Mr. Loomis: I am not willing to accept him as an accountant.

The Commissioner: You may make the computation too.

Mr. Loomis: Exception.

[fol. 340] A. We sold 18,697 crates for $16,257.14.

Mr. Loomis: Before the witness goes further I should like to ask at this time, the witness is reading off some figures, I take it that the witness hasn't any oral recollection or exact recollection of these figures, I take it they have been taken from his books, and that that little paper he has in front of him—is that a transcript from the books?

The Witness: Exactly the figures we got from the merchandise.

Mr. Loomis: Taken from the books?

The Witness: Taken from the people we sold the merchandise to, each and every individual—that is a copy of each bill that we sent to customers for merchandise, from the books.

Mr. Loomis: Taken from the books?

The Witness: Yes.

Mr. Loomis: I ask that the witness be not allowed to read that, but that he be obliged to bring his books into Court, if it is important at all it is important enough to get the best evidence, if the books show any such figures, let us have the books in Court where we can examine them.

The Commissioner: I think the best evidence is the bills.

Mr. Joffe: I will get them if you want them. Here is a man that sold the merchandise, he testified he got 87 cents a crate and $1.35 a case, he testified the number that had been condemned——

[fol. 341] The Commissioner: Are those all that were sold—all sold at the same price?

Mr. Joffe: All the same—the same average price, if the

Court please, some sold at 80 cents, some at 95 cents, some at $1.00.

Mr. Loomis: That means they weren't sold at the same price.

Mr. Joffe: They sold above the market price.

By the Commissioner:

Q. Do you know of your own knowledge the figures they were sold for?

A. No.

Q. You have no recollection at all?

A. No.

Q. That was made up by your bookkeeper?

A. Yes.

The Commissioner: I think you had better bring the bookkeeper.

Mr. Loomis: And the books.

The Commissioner: The books or the bills.

By Mr. Joffe:

Q. Mr. Schnell, do you know of your own knowledge what moneys you have paid out for reconditioning these goods, warehouse bills, etc.?

A. We have checks for what we paid out as well as bills from the storehouse, also a bill from the truckman.

Mr. Loomis: The answer is that he doesn't have personal recollection now.

[fol. 342] Q. If I show you the bills and checks, could you tell of your own knowledge what moneys have been paid out as expenses for reconditioning and warehousing the merchandise received on the steamship Vallescura?

A. Yes, sir.

Q. I am going to show you Libellants' Exhibits 1, 2 and 3 for Identification and ask you to tell us what they are.

Mr. Loomis: I object to them. They speak for themselves.

Overruled.

Exception.

A. These are the amount of money that I paid to the

warehouse, to the Standard Milling Warehouse Corporation for storing the onions from the S. S. Vallescura.

Q. Those are the bills for storage of onions arriving on the Vallescura?

A. Yes.

Q. I show you checks of your firm, numbers 10,587 and 10,645, and ask you whether these checks—if you can tell us what these checks are.

A. These checks are for these bills.

Q. In payment of these bills?

A. Yes.

Mr. Joffe: I offer in evidence the bills of the Standard Milling Warehouse Corporation, and the two checks showing payment thereof.

Mr. Loomis: I simply have to object, Mr. Commissioner, on the ground that none of this, as I said at the beginning, is material or relevant testimony, because the libellant is obliged to show what damage resulted from the placing of [fol. 343] hatch covers on the hatches in good weather, and the placing of ventilator covers on the ventilators in good weather, as distinguished from the closing of those at other times during the trip made necessary by bad weather. The damages that the libellant is attempting to prove by means of these documents and this oral testimony are all of the damage sustained by the cargo on the trip.

Overruled.

Exception.

(Exhibits 1, 2 and 3 for Identification are marked in evidence.)

(The checks are marked Libellants' Exhibits 4 and 5.)

Mr. Loomis: You understand that my objection to all this testimony runs throughout on my theory of the case, it isn't necessary to restate it.

The Commissioner: No, it isn't necessary to restate it.

Q. Did you, Mr. Schnell, remove the merchandise from the pier to a New Jersey warehouse?

A. Yes, sir.

Q. And would that have been necessary if the goods arrived in sound condition?

Mr. Loomis: I object to that on the ground that it is entirely too speculative, it is immaterial and irrelevant.

Overruled.
Exception.

[fol. 344] Mr. Loomis: It is a mere conclusion of the witness, it isn't a question of whether it would have been necessary or not, this witness is not in position to testify in a question of that sort.

Overruled.
Exception.

A. No.

Q. How is merchandise sold in this port when it arrives in good condition, are they shipped——

A. Shipped right from the pier by lighters, and some by trucks.

Q. The lighters are supplied by the railroads?

A. Free of charge by the railroads.

Q. The goods are ordinarily shipped in large quantities?

Mr. Loomis: I don't mind the witness telling——

The Commissioner: Tell what the custom is.

A. When the merchandise arrives in sound condition it is sold f. o. b. New York ex-dock, and the lighterage—whatever railroad the merchandise is routed for, supplies free lighterage.

Q. And when you quoted the market price of the onions, that was based on the shipments of goods in that manner as you have just testified?

Mr. Loomis: Same objection, it is Mr. Joffe testifiying here, he gets an affirmative nod from the witness.

The Commissioner: Don't lead him.

[fol. 345] Q. Please tell us your experience, I may know it but the Commissioner does not.

A. All the Spanish onions are sold f. o. b. ex-dock.

Q. Did you spend any money on lighterage as a result of removal of the goods from the dock or pier at which the Vallescura was docked to the Jersey warehouse?

Mr. Loomis: I object to that because it is asking the witness to form a conclusion as a result of something or other——

The Commissioner: Did you spend any money?

The Witness: I have to remove the merchandise from the pier to the Standard Milling warehouse.

Q. Was the removal of this merchandise to a Jersey pier by lighter cheaper or more expensive than the removal of merchandise if made by trucks to your store in New York City?

A. Just a little less than half, lighterage cost less than half than it would be by trucking.

Q. I show you check of your firm No. 16098 dated December 10th, 1930, to Abell & Tomlinson, Inc., and ask you to please explain to us what this check is for and what moneys it represents?

A. This check—this money was paid to the lighterage company to remove onions from the pier, and covers lighterage to the Standard Milling warehouse.

Q. Was that sum, $521.19, reasonable compensation for such work?

A. Very reasonable.

Q. You know that from your experience?

A. Yes, sir.

[fol. 346] Q. You have been employing lighterage firms for a number of years?

A. Yes.

Mr. Loomis: That is for cross-examination.

Mr. Joffe: I offer the bill in evidence.

Mr. Loomis: Same objection, immaterial and irrelevant, because it is proof that might properly be put in if they could prove damages generally.

Overruled.

Exception.

(It is marked Libellants' Exhibit 6.)

Q. Now, Mr. Schnell, I forgot to ask you—the storage bills, Exhibits 1, 2 and 3, in this record amounting to $336.35 for warehouse charges, are they fair and reasonable charges for that service?

A. Yes, sir.

Q. Mr. Schnell, did you pay any sums of money for carting the onions from the pier to the store?

A. Yes, sir.

Q. Who did the carting?

A. Rabin & Shoobs.

Q. I show you this bill and ask you whether this is the bill that covers the cartage of this cargo from the steamship Vallescura to your store?

A. Yes, sir.

Q. Was it paid by you?

A. Yes, sir.

Q. Was that a reasonable charge for the services?

A. Yes, sir.

Q. Have you got the check here for this amount?

A. I don't think so.

Q. Will you explain why?

A. Probably paid some other bills with this item.

Mr. Joffe: I offer the bill in evidence.

The Commissioner: You mean that some other bills were [fol. 347] probably covered by one check?

Mr. Loomis: Objected to on the grounds that it is immaterial.

Overruled.

Exception.

(It is marked Libellants' Exhibit 7.)

Q. Did you expend any money for the removal of bad onions from the warehouse after reconditioning the onions?

A. Yes, sir.

Q. I show you check of your firm No. 10,667, dated January 25th, 1926, and ask you if you can tell us what this check was paid out for.

A. For removing the damaged onions from the warehouse.

Q. After they were assorted from the crates, you mean after they were separated?

A. After they were separated.

Q. The good from the bad?

A. That is right.

Q. Was that a reasonable charge for the dumping?

A. Yes.

Q. And was that endorsement that you see on the back of the check at the time you delivered it to Mr. Smith?

A. No.

Q. I am speaking of this (indicating).

A. No, I have not seen it.
Q. Miss Elfin will knew that?
A. Miss Elfin will know that.
Q. Miss Elfin is your bookkeeper?
A. Yes.

Mr. Joffe: I offer the check in evidence.
Mr. Loomis: Objected to only on the ground that it is immaterial and irrelevant to this controversy.

[fol. 348] Overruled.
Exception.

(It is marked Libellants' Exhibit 8.)

Q. Did you employ labor in reconditioning the merchandise on the pier as well as in the warehouse and in your store?
A. Yes.
Q. Have you a record of how much you have spent for labor in reconditioning the cargo?
A. Yes.
Q. I show you these checks of your firm—by the way do you know of your own knowledge how much you spent?
A. No, just the checks, I don't recall offhand.
Q. Who in your firm will know definitely what was spent?
A. Miss Elfin.
Q. Your bookkeeper?
A. Yes.
Q. Was this labor money that was spent by your firm, was that necessary?
A. Yes.
Q. And were the amounts that your firm paid for it reasonable amounts for that service?
A. Yes, sir.
Q. All this work that you have testified to and expense that was caused as you have testified, could you tell the Special Commissioner of your own knowledge what was the cause of such expenditure—the reason for it.

Mr. Loomis: I object to it.
Overruled.
Exception.
Mr. Loomis: If that relates to the condition of the onions I object, if it is merely——

The Commissioner: Why you had to spend all this money?

[fol. 349] A. Because the cargo arrived in damaged condition, the onions from the steamer Vallescura arrived from the Vallescura in a damaged condition.

The Commissioner: If they had arrived in sound condition, what would have been done?

The Witness: They would have been shipped in the original package to the consignees throughout the country.

Q. And could it be shipped in damaged condition as it arrived?

A. No, sir.

The Commissioner: It was necessary to recondition and repack it?

The Witness: Absolutely, forced by the Health Department to do so.

Cross-examination.

By Mr. Loomis:

Mr. Loomis: Of course my position, Mr. Commissioner, is that none of this testimony is material or relevant for the reason already stated, because all of it is applicable to general damages and none to special damages.

The Commissioner: Have you any cross examination?

Mr. Loomis: Without prejudice to this objection, I might ask one or two questions.

Q. Isn't it true that practically every onion shipment that comes to these shores has some damaged onions in it?

A. No, sir.

Q. Isn't it true, Mr. Schnell, that the average damage to [fol. 350] onion shipments is 10 percent. of the shipment?

A. No, sir.

Q. Haven't you so testified in other cases?

A. No, sir.

Q. That the average damage to onion shipments is about 10 percent. in an ordinary good shipment of onions?

A. No, sir.

Q. Mr. Schnell, isn't it true that you have had to and do repack every shipment of onions that you get—recondition them to throw out damaged onions even with what is called a good shipment in ordinary condition?

A. No, sir.

Q. You have never reconditioned?

A. No, sir, a good sound shipment never needs to be reconditioned.

Q. You mean to say that an ordinary shipment of onions arrives 100 percent. sound condition?

A. Yes, with the exception of a few crates bringing out from the steamer may be broken up by handling of longshoremen, these may have to be recoopered and put in good condition.

Q. Just answer my questions. Is it true or is it not true that an ordinary shipment of Spanish onions arrives here in 100 percent. sound condition?

A. Yes, it is true, coming in 100 percent. sound condition.

Mr. Loomis: In order to save time, I think that is all, but it is entirely possible I may want to ask another question or two of Mr. Schnell regarding market value of onions, after I have had a chance to consult those papers to which he has referred I take it he has none of those papers here, [fol. 351] I haven't any. Will the witness be available for that purpose?

Mr. Joffe: Yes, any time at all.

Tom LaForte, being duly sworn and examined as a witness for the libellants, testified as follows:

Direct Examination.

By Mr. Joffe:

Q. Mr. LaForte, what is your occupation?

A. Foreman fruit packer.

Q. And with whom are you employed?

A. Mr. Harry Schnell.

Q. How long have you been employed by the firm of H. Schnell Company, Inc.?

A. Eighteen years this coming March.

Q. During all that time were you a fruit packer?

A. Yes, sir.

Q. Do you remember the steamship Vallescura?

A. Yes, sir.

Q. Were you in charge of re-packing of the onions after

discharge from that steamer, after they were on the pier and in the warehouses?

A. Yes, sir.

Q. You personally were in charge of it?

A. Yes, sir.

Q. You saw the re-packing done before your eyes?

Mr. Loomis: Don't lead the witness.

A. Yes.

Q. Will you please tell us what you have done and how you kept a record of what amounts were discarded and what [fol. 352] amounts were placed in good condition and shipped.

A. I can't give you the record.

Q. Just what you have done.

A. Just have a gang of men down there reconditioning according to orders and number of cars we have to ship. During the day I take a record of whatever shipment I do during the day, at night I call up the office and tell them just what was shipped.

Q. To whom would you give that record?

A. Our bookkeeper.

Q. Miss Elfin?

A. Yes.

Q. What did you do with the crates and half cases that were bad, I mean that were eliminated from the good ones?

A. When I wound up on the pier I turned the record into our bookkeeper also.

Q. And the same procedure is followed at the warehouse?

A. Yes.

Q. After you got through assorting or reconditioning the onions on the pier, what did you do?

A. After I got through?

Q. Yes.

A. Why, the balance of the onions were put on lighters and taken over to the Standard Milling warehouse in Jersey.

Q. What happened to the other merchandise that wasn't taken over to the Standard Milling warehouse and wasn't shipped?

A. It was condemned by the Board of Health.

Q. You were there when the Board of Health condemned the onions?

A. Yes.

Q. What happened with reference to the onions that were not shipped in the warehouse in New Jersey?

A. The ones that were not shipped, those were bad onions, all decayed, and after we got through they carted them away [fol. 353] to the dumping ground.

Q. Did you obtain any such certificate from any authorities in the State of New Jersey?

A. That I don't know, the office takes that up.

Q. Did you report to Miss Elfin the amount of bad onions that were dumped in Jersey?

A. Yes, sir.

Q. Mr. LaForte, did you notify Miss Elfin from time to time what moneys were required for the payroll to the laborers on reconditioning of these onions?

A. Yes.

Q. How often did you do that?

A. Every Friday evening, just before pay day.

Q. When is pay day?

A. Saturday.

Q. On Saturday what does Miss Elfin do?

A. She has the money sent over to us.

Q. Who receives the money?

A. I do.

Q. And the money that Miss Elfin sent over to you was actually paid out to the laborers?

A. Yes, for reconditioning the onions.

Q. How many hours a day do laborers work on reconditioning of onions?

A. Eight hours a day.

Q. What did they receive in the port of New York 1925?

A. $9.00 in Staten Island.

Q. Why do you say Staten Island?

A. In New York we pay $8.00, and being ferriages allowed to some of the men, they are allowed a dollar a day extra.

Q. That was fair and reasonable compensation in the port of New York in December, 1925, and January, 1926, for those services?

A. Yes.

Q. You actually paid out this money to the laborers?

A. Yes, sir.

[fol. 354] Mr. Loomis: No cross examination except that general objection to the line of testimony.

The Commissioner: Yes.

LEYA ELFIN, being duly sworn and examined as a witness for the libellants, testified as follows:

Direct Examination.

By Mr. Joffe:

Q. Miss Elfin, what is your occupation?

A. Bookkeeper.

Q. For what firm?

A. H. Schnell & Company.

Q. How long have you been bookkeeper for that firm?

A. Eight years.

Q. Continuously?

A. Yes, sir.

Q. And are you in charge of the payments made by the firm for their payrolls and other items?

A. Yes.

Q. Are you acquainted with the payments made by H. Schnell & Company for laborers in reconditioning goods?

A. Oh, yes.

Q. On the steamship Vallescura?

A. Yes.

Q. Will you tell us of your own knowledge how much was paid to laborers for reconditioning that cargo.

A. I would like to look at my records.

Q. You have records to refresh your recollection?

A. Yes.

Q. Please do so.

Mr. Loomis: Are these original records or merely copies of entries in books?

[fol. 355] The Witness: Some of these are original records and some are copies from the books.

Q. Who keeps the books?

A. I do.

Q. Who made the copy of the books?

A. I did.

Mr. Loomis: When you come to them in your testimony, will you please specify which are from copies?

The Witness: Yes.

Mr. Loomis: And which are from original records?

The Witness: Yes.

Q. (Repeated.) Will you tell us of your own knowledge how much was paid to laborers for reconditioning that cargo.

A. The total?

Q. The total, we will take the items separately afterwards.

A. $3,939.75.

Q. That was paid to the laborers for reconditioning?

Mr. Loomis: Please let the witness testify.

A. I did answer that, I was waiting for the next question.

Mr. Loomis: Is the paper you have just read from an original record or a copy?

The Witness: An original record.

Q. It is represented by checks paid out by your firm?

A. Yes.

[fol. 356] Q. I show you five checks and ask you to please tell us whether these checks cover the items of labor paid out by H. Schnell & Company in reconditioning the goods, and to whom you gave that money.

A. These checks represent the payroll that was drawn on the dates on these checks. Some of the moneys drawn on these particular dates apply to other labor, other than the Vallescura, but the money was drawn on these particular dates. I have here exactly the figures that apply to the Vallescura.

Q. Will you please tell us then the figures which apply to the Vallescura from day to day, how much was paid out.

A. Yes.

The Commissioner: Haven't you got that all on a record?

The Witness: Yes.

The Commissioner: That is an original memorandum which you have?

The Witness: An original memorandum.

Mr. Joffe: I offer that in evidence.

(It is marked Libellants' Exhibit 9.)

Mr. Loomis: May I just ask one or two questions on that: When you say this is the original memorandum, do you mean that it was a memorandum made up by you on the dates indicated on the memorandum, to wit, December 24th, 28th, 31st, January 9th and 11th?

The Witness: Yes.

Mr. Loomis: Here is an item referring to December 24th, 1925, that was written on this sheet on that date?

The Witness: On that date.

Mr. Loomis: Then you kept this memorandum and made [fol. 357] the following entries on the following dates referred to thereon?

The Witness: Yes.

Mr. Loomis: December 28th, 31st and so on?

The Witness: Yes.

Mr. Loomis: You have kept it in your possession ever since?

The Witness: Yes.

Mr. Loomis: No objection except the general one that it is immaterial and irrelevant.

Overruled.

Exception.

Q. And the $3,939.75 was actually paid out in cash by the firm of H. Schnell & Company?

A. Yes.

Q. Drawn by checks including this sum of $3,939.75 plus other amounts as the payroll called for?

A. At that time.

Q. Now, Miss Elfin, will you please tell us how you receive reports of the shipments of merchandise from the pier or from the warehouse?

A. By telephone.

Q. From whom?

A. Who is in charge of the ship at that time.

Q. In this case it was from Mr. LaForte?

A. From Mr. LaForte.

Q. What do you do then?

A. I make note of those particular shipments that he has made that day, and bill them accordingly.

Q. Did you follow that procedure on the steamship Vallescura?

A. I did.

Q. And have you the original record of all of the ship-
[fol. 358] ments that were made from that steamer, the people to whom the shipments were made and the quantity of shipment to these said persons and the prices at which it was sold?

A. That would be the bill itself.

Q. You haven't got the bills with you, have you?

A. No, I haven't.

Q. Have you here a memorandum of the bills that will refresh your recollection so that you could testify today accurately as to every shipment made from the steamship Vallescura?

A. I have here a memorandum that I made directly from the bills—copies of the bills.

The Commissioner: From copies of the bills?

The Witness: From copies of the bills.

Q. What happens to the original?

A. The original goes to the customer.

Q. Go ahead.

A. It is a loose leaf system, and copies of those bills are kept for a certain length of time, because they accumulate too rapidly, we haven't the space to keep them.

The Commissioner: Then they are destroyed?

The Witness: Then they are destroyed.

Q. But the original bills that you speak of, so far as you know, are in possession of every customer?

A. In the possession of every customer.

Q. To whom it was shipped?

A. Yes.

Q. You know the name of the customer, the quantity of merchandise and the price at which it was sold?

A. Yes.

[fol. 359] Q. Can you tell us, referring to your original memorandum, what merchandise was sold from the Vallescura, to whom it was sold and at what price it was sold?

Mr. Loomis: Objected to, that isn't in compliance with the Commissioner's ruling already made in the case. He called for the bills or the books, now as I understand, the witness has neither, but a memorandum that she says she made up from copies of the bills. It clearly isn't the best evidence.

By the Commissioner:

Q. When LaForte reported to you a shipment, you made a memorandum of it, I suppose?

A. Yes.

Q. Have you got those memoranda?

A. No, I haven't those.

Q. Those were destroyed?

A. Those were destroyed.

Q. They are just rough?

A. On any piece of paper, then I make up the bill.

Q. Don't you enter it in the book?

A. From the bill I have a sales ledger account it goes into from there, but the sales record is a copy of the bill.

By Mr. Joffe:

Q. That is a copy of the bills accumulated from time to time?

A. Yes.

The Commissioner: This memorandum you have here was made up from copies of the bills?

The Witness: From copies of the bills.

[fol. 360] The Commissioner: When was that made up?

The Witness: In January, 1926.

Mr. Loomis: What was your purpose in making it up at that time?

The Witness: When I prepared the statement of sales on that steamer.

Mr. Loomis: For this litigation?

The Witness: I prepared this, what the purpose of it is I can't say.

Mr. Loomis: You prepared it for the lawyers?

The Witness: I was asked by Mr. Schnell to prepare it.

By the Commissioner:

Q. That memorandum is taken from the bills?

A. From the bills.

Q. Not from the books?

A. That is the sales record.

Q. But you said you entered the bills in books afterwards, the customer and amount?

A. You see I have a sales ledger, but my sales ledger

wouldn't tell me what the shipment consisted of, it would tell me the amount and the date.

Mr. Loomis: It would tell the customer's name?

The Witness: Yes, it would tell the customer's name, but he may have bought other merchandise.

Q. But you have here a memorandum which you made from copies of the bills or original bills?

A. Yes.

Q. You made it at that time?

A. Yes.

[fol. 361] Mr. Loomis: You have a sales ledger in your office?

The Witness: For 1925 I don't know definitely because we had our building altered last winter and we discarded a number of old books.

By Mr. Joffe:

Q. You may have it?

A. I may, I am not sure.

Mr. Loomis: The sales ledger for the latter part of 1925 and early 1926?

The Witness: Yes.

Mr. Loomis: That it seems to me would be the important document and not these loose leaves that were not made up in any permanent form—it is the book itself that I think we should have.

Mr. Joffe: The sales ledger, as Mr. Loomis would know if Mr. Loomis was acquainted with accountancy, would show only the total amount of sales and would not show whether onions, apples, potatoes or anything else—in some instances sales ledgers only show the total amount of sales.

By the Commissioner:

Q. Does the sales ledger contain the customer's name and the amount?

A. His name and his account, the money, that is all.

Q. But does not specify what for?

A. No.

Mr. Loomis: But the bills show in detail?

The Witness: Yes, the bills show in detail.

[fol. 362] Mr. Loomis: The bills are the best evidence.

Q. You say you have destroyed the bills?
A. For 1925 and 1926.

Mr. Loomis: Objected to very seriously.

Overruled.
Exception.

By Mr. Joffe:

Q. Which is the memorandum that you made at the time?
A. Right here, this is on the crates, this is on the half cases.

Mr. Joffe: I offer in evidence the two papers just handed to the stenographer by the witness.

Mr. Loomis: I object to the receipt of those in evidence because the testimony of the witness shows that they are not the best evidence, that they are copies of papers made for the purpose of this litigation from certain other papers and documents which have been lost or destroyed, which were the best evidence. I also object on the ground that besides the fact that they are not competent, on the ground that they are entirely immaterial and irrelevant.

Overruled.
Exception.

(They are marked Libellants' Exhibits 10 and 11.)

[fol. 363] Can you tell us, Miss Elfin, what was the total amount received by H. Schnell & Company on the sale of these crates and half cases?

Mr. Loomis: Same objection, I observe the witness is merely reading from those papers.

Overruled.
Exception.

A. It would be the sum total of these two.
Q. Please give me the total.
A. $17,067.14.

The Commissioner: Did you make that typewritten paper yourself?
The Witness: Yes.

Q. When?
A. January 14th, 1926.
Q. The paper which I hold in my hand is a typewritten copy of the Exhibits 10 and 11?
A. Yes, that is right.

Mr. Joffe: I offer this paper for the convenience of the Court.
Mr. Loomis: No objection save in so far as the papers of which it is a copy are not admissible, for that reason the same objections are made as to the others.

Overruled.
Exception.

(The typewritten copy of Exhibits 10 and 11 is marked Libellants' Exhibits 10-11-A.)

Q. And the receipt of the sum of $17,067.14 appears in the books of the firm?

[fol. 364] Mr. Loomis: Objected to.

Sustained.
Exception.

Q. Now, Miss Elfin, will you please tell us of your own knowledge the total amount that was paid out for labor, lighterage, warehousing, cartage and dumping as they call it of the rotten onions on the steamship Vallescura?

Mr. Loomis: What does this question mean, what this young lady delivered to the witness who just testified?
Mr. Joffe: To Mr. LaForte, plus other checks we have in evidence paid out for lighterage and cartage.
The Commissioner: Merely a summing up.
Mr. Joffe: The total amount already testified to.
Mr. Loomis: Are you offering now that sum total of the checks in evidence?
Mr. Joffe: The sum total of the checks in evidence and the bills and labor charges as testified by the witness.
Mr. Loomis: Were all of the payments made by check?
Mr. Joffe: Yes.
Mr. Loomis: What you are asking for is the sum total of all checks.
Mr. Joffe: If you followed this, you remember I asked Mr. Schnell one case where he had no check, it was a bill,

if he finds it I will offer it and so on, but I am trying to present in a concrete form the total payments testified by [fol. 365] the witness so the Commissioner can check back and see what moneys were received.

Mr. Loomis: I object for this reason, the witness has so far only testified about one class of payments that she made, that is these payments that she made to Mr. LaForte in response to his requisition for payroll which would be telephoned to her Friday evening and she would send it on Saturday.

The Commissioner: The witness is a competent accountant, she is merely summing up.

Mr. Joffe: I will show here checks in her own handwriting.

Mr. Loomis: What I object to is something very different. If this testimony is worth anything, let us have it in properly. Here is the point I am making, that Mr. Joffe is by that question in effect having this witness testify that she knows that all of this money was paid out in connection with the Vallescura shipment. She hasn't said anything of the kind. All I am objecting to is that nothing creep into the record of that sort. If he wants her merely to compute what the other witnesses have said were paid out, all right.

Mr. Joffe: If there is any question I will put it differently.

Q. Miss Elfin, I show you Libellants' Exhibits 1, 2, 3, 4 and 5. Will you please tell us if you know of your own knowledge what these bills are for, whether you drew checks to cover them and whether they were paid by your firm.

[fol. 366] Mr. Loomis: I object. Where are the books?

Overruled.
Exception.

By the Commissioner:

Q. Have you computed the amounts that were paid out for expenses for storage and other items which have been testified to?

A. I have.

Q. You have been here during the whole examination?

A. Yes.

Q. You have computed the whole amount?

A. Yes.

Q. Will you please give it to us.

A. Now, I understand what you mean, I haven't the total of just these.

Q. You haven't added up all the expenses which were incurred in reconditioning, storage, lighterage, etc., in regard to the damage to the cargo?

A. I have the total costs on that steamer, that would include letter of credit, duty, etc., then, I have those also together with that cost that would make up the cost of the cargo, but I haven't just these items totalled.

Cross-examination.

By Mr. Loomis:

Q. Miss Elfin, I was correct, was I not, in my understanding that that paper—these two papers marked Libellants' Exhibits 10 and 11, which I show you were made up by you at the request of Mr. Schnell?

A. Yes.

Q. From the copies of the bills?

A. Yes.

Q. And presumably they were for the lawyers, is that correct, in connection with this litigation?

[fol. 367] A. No, not necessarily, we keep a record of all our steamers.

Q. But the fact is that he did specially request these papers to be made up, Exhibits 10 and 11 at that time when you made them up?

A. He asks me after every cargo is shipped out to prepare—to get an idea of what the cargo sold for against the costs.

Q. But he did specially request you to do it in connection with those two papers, Exhibits 10 and 11, he requested you to make those up from copies of bills in your possession?

A. Not especially, just in the general course of my work that I make them up for all cargoes.

Q. Let me strike out "specially"—did he speak to you and ask you to make up those memoranda, Exhibits 10 and 11?

A. Yes, he did.

Q. Do you remember the date on which he did it?

A. No, I don't remember the date, probably it would be shortly after all the shipments had been made.

Q. Can you tell me how many other shipments of onions—Spanish onions—you had had to deal with in the years 1925 and 1926?

A. Why, we have on an average of three or four cargoes a month.

Q. Did you in connection with those other shipments of Spanish onions say at the rate of three or four per month during 1925 and 1926, make up similar memoranda referring to the costs of reconditioning, labor, etc?

A. If there were any other costs I would, yes.

Q. If there were such costs of reconditioning and labor?

A. Yes.

Q. Would you have those in your possession at this time?

[fol. 368] A. That would be so long back, I doubt if I would have them.

Q. You doubt if you would have them?

A. Yes.

Q. Why should you have kept these two Exhibits 10 and 11 relating to this particular shipment and not other similar memoranda made up by you in connection with other shipments?

A. These were in connection with the Vallescura, in the Joffe & Joffe file.

Q. But they remained in your possession?

A. Yes, because the claim was still pending.

Q. They were not in Joffe's possession?

A. No, but I have a claim folder just the same.

Q. I am just asking you the reason, you say you kept these because there was litigation touching the Vallescura?

A. Yes.

Q. The others were destroyed or lost because there was no litigation touching them?

A. No, not because there was no litigation attached to them, because they are from 1925, and we do not keep our records more than two years.

Q. Two years—at the end of two years you destroy all your records?

A. Not necessarily at the end of two years, because this past 1930 we made a general clean out because we had our building altered.

Q. But what is the general rule, if it isn't two years what is it?

A. We never had any general rule.

Q. You say you had no books other than these memoranda and that one book the sales ledger, is that right?

A. I said that I had a sales ledger—I said I might have, I am not sure.

Q. But I say you didn't keep any books other than these memoranda like Exhibits 10 and 11 and the sales ledger, [fol. 369] is that correct?

A. My sales book is a loose leaf book.

Q. Just answer my question, is it correct or not correct that you keep no books save these original memoranda like Exhibits 10 and 11 and your sales ledger?

A. I don't quite understand what you mean.

Q. Did you keep any other books, whether loose leaf books or not, but books—you know what books are?

A. Yes, I know what books are.

Q. Other than the sales ledger that you have already described?

A. In what connection?

Q. In any connection at all?

A. Yes.

Q. What were the other books that you kept besides the sales ledger?

A. Why, the cash book, there is a general ledger, journal, whatever—every business has a set of books.

Q. Very well, would not the cash journal show the amount of cash paid out on the particular date on which you paid it out, the particular purpose for which you paid it and to whom you paid it?

A. Yes, it would.

Q. Well, now, where is that book?

A. Those books are kept from the checkbook, the original record is the check, the check is made and from the checkbook is posted into the cash book.

Q. Pardon me, I am asking you where that book is, that is all.

A. What book?

Q. The cash book, the one I have been just asking about.

A. The cash book for 1925, I may have and may not have.

Q. Do you recall its having been lost or destroyed?

A. I don't know if it has been.

Q. How often do you destroy your books?

A. Well, we made a general clean-up when we had our office—the whole building was renovated.

[fol. 370] Q. How long ago was that?

A. December and January of this year.

Q. What do you mean renovated?

A. The whole building was moved, floors lowered, beams——

Q. That was in January of this year?

A. Yes, sir.

The Commissioner: January, 1931, or 1930?

The Witness: The end of 1930 and beginning of 1931.

Q. You say you destroyed your books in connection with that?

A. Well, we came across a lot of old books at the time, we thought we wouldn't keep them because they were old and dirty, we threw them away.

Q. And you think that your cash book for 1925 and 1926 may have been destroyed at that time?

A. It might have been, yes.

By the Commissioner:

Q. Do you know whether it was or not?

A. I couldn't say definitely.

Q. You couldn't say definitely?

A. No.

By Mr. Loomis:

Q. That would also show the amounts received, would it not?

A. Yes.

Q. From your customers?

A. Yes.

Q. You would enter them in there as and when you received cash from your customers?

A. Yes.

Q. Of course you don't have the original checks you receive from customers?

A. Oh, no.

[fol. 371] Q. But you do have entries made in those books at the very time when checks are received?

A. Yes.

Q. That is the cash book which you say you don't know where it is now?

A. Yes.

Q. You also had a general ledger, hadn't you?

A. Yes.

Q. And you would post in that general ledger under each account, I suppose, the payments made on account of expenses or losses, and the amount received from the particular customers?

A. Yes.

Q. Where is that general ledger?

A. Well, the same thing might have happened to it.

The Commissioner: Is that a loose leaf ledger?

The Witness: No, it isn't.

Q. Where is that book?

A. I just said it may be with the other books, we may have it and we may not have it.

Q. It may have been lost or destroyed?

A. Lost or destroyed, yes.

Q. You don't know where it is?

A. No.

Mr. Loomis: I think under the circumstances, Mr. Commissioner, that the reception in evidence of these copies of memoranda from copies of bills when they have in their possession, or should have in their possession the original books themselves, is improper, and that they should be forced to bring here those books, or explain where they are.

The Commissioner: The ledger account would merely [fol. 372] show a bill rendered for so much to a customer and the receipt of money?

The Witness: Yes.

The Commissioner: Would not specify what it was for at all?

The Witness: No.

Q. Wait a moment, you said that was true of the sales ledger, I am talking of the general ledger that would contain posted up in it every item shown in the cash book?

A. Not every one.

Q. Classified under the proper account?

A. Let me explain it in my way just a moment—the gen-

eral ledger would only have cash payments under their specific heading.

The Commissioner: Give us an instance.

The Witness: On purchases under "cost"; duty under "duty"; labor under "labor"; loading under "loading". The accounts receivable there would be from the customer, or the accounts payable, what is owing, that is my general ledger.

The Commissioner: But that does not show any particulars?

The Witness: That does not show any particulars.

Q. But the cash book does show them?

A. The cash book only shows from the checks. My original record is my check, that is the first thing I made, then I post from the stub of the checkbook into the cash book for my payments.

Q. But it also shows the amount of cash received?

A. Yes, on the other side.

[fol. 373] Q. Entered at the time it was received, from whom it was received and for what it was received?

A. The cash received—well, the customer's name ap- [illegible] in the accounts receivable or any other item.

Q. Precisely. After those various entries were made at once in the cash book?

A. The cash receipts are made immediately.

Q. Cash paid too?

A. Cash paid, the original record is the check, that is the first thing I make is the check in payment.

Q. Cash received is entered immediately and cash paid is entered up from your check stubs?

A. Yes.

Q. Afterwards at your convenience you enter into the general ledger under the separate accounts headings you enter the various payments made by payments received, taken from the cash book?

A. Yes.

Mr. Loomis: It seems to me that is the ordinary purpose of a cash book and general ledger and that they are very important in this case, they being the original documents we should have them.

Redirect examination.

By Mr. Joffe:

Q. Will you please tell us when you receive any cash payments or check from a customer, do you enter in your cash book say cash received for such merchandise or just say received $200 from John Smith?

A. Just the name and amount.

Mr. Loomis: We can see what it is when we see the books.

[fol. 374] Q. Did you receive from Mr. LaForte reports of the abandoned merchandise?

A. Yes, I did.

Q. Can you tell us of your own knowledge what merchandise was dumped in the New Jersey warehouse?

A. Yes, I can.

Mr. Loomis: How can that be done—she got a report, what LaForte told her.

Mr. Joffe: That is all I want.

The Commissioner: Let him prove his case in his own way.

Exception.

Q. Tell us what LaForte reported to you as he testified?

Mr. Loomis: I object to that.

Overruled.

Exception.

A. He reported that he lost in warehouse 3272 crates——

Mr. Loomis: Are you reading that from some document or stating it from memory?

The Witness: No, not from memory.

Mr. Loomis: May I cross examine?

The Commissioner: Yes.

By Mr. Loomis:

Q. What are you reading from?

A. From a memorandum I made.

Q. At the time?

A. At the time, yes, I have it here too.

Q. Look at what you read from, that is in in pencil?

A. In pencil.

Q. On the page the rest of the entries in which are written in ink?

A. Yes.

[fol. 375] Q. It is just an old telegraph blank, isn't it?

A. Yes.

Q. You mean that is the only original entry that you have in your possession showing what LaForte told you?

A. No, that is not the only one, I don't know whether this is the first or one of the others, but Mr. Joffe asked me, I looked here and saw this.

Mr. Loomis: Let us have marked for identification the paper you have just been reading from.

Mr. Joffe: I suggest if it is marked for identification it is marked as an exhibit at Mr. Loomis' request.

Mr. Loomis: At my request, but not my exhibit.

The Commissioner: We won't have it marked unless it is marked as someone's exhibit.

Q. The rest of the entries on that paper which has been marked for identification——

The Commissioner: This is not in evidence, you can't cross examine about it.

Exception.

(It is marked Respondent's Exhibit A for Identification.)

Q. You don't mean to say, do you, that the penciled notation on the bottom of this paper which has been marked Exhibit A for Identification was made at the same time as the other entries appearing on it?

[fol. 376] Mr. Joffe: I object to it as incompetent, this paper marked for identification is not in evidence, the witness cannot be cross examined thereon. I have no objection to the paper being offered in evidence if Mr. Loomis so desires.

The Commissioner: That objection is overruled.

Exception.

A. Yes, they were possibly two or three minutes later or earlier.

Q. Why was it made in pencil and the others in ink?

A. I may have had a pencil, then picked up a pen.

Mr. Joffe: I offer in evidence the paper on which Mr. Loomis examined this witness.

Mr. Loomis: Objected to as incompetent, immaterial and irrelevant.

Overruled.

Exception.

(Respondent's Exhibit A for Identification is marked in evidence as Libellants' Exhibit 12.)

Mr. Joffe: Libellant rests.

COLLOQUY

Mr. Loomis: I will ask you, Mr. Commissioner, in view of the latest testimony regarding the books it now develops they kept a regular set of books, a cash book and general ledger, I feel in view of that those books should be produced for examination in lieu of this stray memorandum.

The Commissioner: I shan't order the books to be produced.

[fol. 377] Mr. Joffe: I say to your Honor that the books if produced will show nothing.

Mr. Loomis: I take exception to that ruling. I ask that the Commissioner now strike out all of this testimony based on the stray memoranda alleged to have been made from original entries shown in the bills or in the books. The Commissioner was under the impression originally when he received the stray memoranda in pencil in evidence that they were the only original sources of information still in existence, now it appears that the books may be in existence, I think we should have the books, of course if the Commissioner rules against me I can only take an exception.

The Commissioner: I rule against you.

Exception.

Mr. Loomis: The libellant has come into this Court today after waiting for two and a half years after the interlocutory decree was entered in this case on the merits, and after I had supposed that the case was entirely closed, and after my clients had supposed it was entirely closed and everybody connected with our side of the case had supposed it was entirely closed, they come into Court, and notice this

hearing for the assessment of their damages. The reason why they haven't proceeded before is obvious, that under the interlocutory decree they were not entitled to recover damages suffered by the cargo that arrived at New York, [fol. 378] they were entitled only to recover the damage that had resulted from the negligence of the carrier as found by the Court, and that negligence consisted in a particular act or acts, to wit the closing of the hatches and ventilators in what was said to have been good weather on certain occasions—most of the trip having been performed in bad weather, therefore the hatches and ventilator covers having to be kept closed during bad weather. In any event they knew that they could not prove what small portion of their damage, if any, was due to the fact that the hatches and ventilators had been closed, as they argued, at certain times in good weather, so they weren't interested in their case and let it lag for two and a half years, and suddenly on the chance—the merest chance—they put across a claim of some kind and they come into Court at this remote time and offer proof of general damages, making no pretense of offering a single line on the question as to what damage, if any, was caused by that closing of the hatches and ventilators on certain occasions in good weather. Then they expect us to bear the burden of meeting this claim which is for the general damages demanded in the complaint or libel. They were not allowed to recover the general damages complained of in the libel, they were allowed only certain specific matters, as to all others the Court ruled they were not entitled to recover a penny. Mr. Joffe can sit there and [fol. 379] smile, but he knows everything I am saying is exactly true. Now the Commissioner will see the position in which we are placed. I know that on the law—I am satisfied that on the law they haven't made out any case under the interlocutory decree, so I am disposed to rest, but if the Commissioner should be of the impression that my position on the point of law is badly taken or mistaken, then I should wish to have an opportunity to produce proofs here to show—even I—to show what damage, if any, was caused by those particular things for which damage was allowed in the interlocutory decree. That is a point it seems to me it is for the Commissioner to rule which side has the burden of proving that, if I have the burden I want to bear it. Mr. Joffe says I have the burden, he doesn't propose to bear it.

I don't want to go to work and take testimony on the other side of the ocean, where I would have to go, so I ask the Commissioner at this time in view of the circumstances to rule at this time as to who has the burden of proving this question. If I have it I want to bear it, but I say that under the law and under the interlocutory decree I haven't got this, because Mr. Joffe knew he couldn't bear it, he has waited all this time, now he comes into Court hoping that the burden may be thrust on me. My special request of the Commissioner is that he rule within the next fortnight [fol. 380] who really has the burden of proof under the law. If I have I will be glad to proceed and get proofs on the case.

The Commissioner: Mr. Loomis, I do not think I am called upon to do that at all. I think the rule is perfectly well settled that you can either rest your case now or you can put in your testimony, then the question will come up as to who has to prove and what the proofs should be. I don't think that there is any rule recognized by which you can move practically to dismiss the case on the ground they haven't proved it, and then afterwards go on and prove your case.

Mr. Loomis: Very well, if the Commissioner takes that point it certainly will do me no good during the reference to restate my position. I shall have to move forward and take this additional testimony which will be that no such damage was caused by that particular cause. I shall have to get a commission to take testimony abroad.

Mr. Joffe: Mr. Commissioner, I am really surprised at Mr. Loomis saying that this was the first he heard of this hearing, they have obtained already two adjournments. Mr. Loomis in his opening told your Honor—stated that it will be impossible to determine what portion of the cargo was damaged by negligence or so-called negligence as found by the Court on the part of his client. I cannot see how he could ask for an adjournment in a manner which would [fol. 381] indicate it would take a year.

The Commissioner: Mr. Loomis is entitled to a reasonable time to obtain his testimony. I will give him opportunity to find out from his clients. I will ask you to telephone to or communicate with your agents here and find out what they know about these witnesses whether they are available or not, and let me know by Friday what informa-

tion you have. If they do not know about it you will have to cable or something of the kind, you should be able to get an answer to that by the middle of next week.

Mr. Loomis: To save time I will have them cable right away.

The Commissioner: But it is within the range of possibility they are here or going to be within the next day or two. I want you to find out and let me know by Friday next just what can be done in that way. This matter is adjourned until Mr. Loomis communicates with me or with Mr. Joffe.

Mr. Loomis: Subject to call?

The Commissioner: Yes, only you must let me know as soon as possible when these witnesses will be available.

[fol. 382] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before William Parkin, Esq., Special Commissioner

Further hearing held at the office of the Special Commissioner, Post Office Building, Park Row, New York City, January 19, 1933.

Present: Mr. Parkin, Mr. Loomis and Mr. Joffe.

Mr. Loomis: I may explain the delay in this matter: as soon as we received the leave to take the testimony, we immediately set on foot an investigation to find out whether the men were still in the employ of the Company, and where they were. We found their line to the United States had been discontinued, and their agency in the United States had been discontinued, and we corresponded directly with the owners. We found that those men were no longer in [fol. 383] their employ, and were scattered in various Steamship Lines over the world, and it would be months before they would be back in Trieste. We advised them to pursue their investigations as promptly as possible, because of the fact that we must proceed, under your ruling, with dispatch, and they did so, and they notified us about the fact that they had located them, I think it was last summer. We immediately proceeded to have commissions issued—that was issued on consent—and the interrogatories

and cross interrogatories were sent forward. The last advices I have had, which was a few weeks ago, is to the effect that one of those commissions has been executed, one of the seamen having returned, but the other two have not returned and have not become available for examination, but that they were hopeful they would be back for examination very shortly. Those are the last advices I had. There are three of the witnesses.

The Commissioner: Has that commission been returned, the one that was executed?

Mr. Loomis: No. The Consul is holding it until he completes the examination of the two other witnesses.

Mr. Joffe: We took an adjournment a year and three months ago, for the purpose of these commissions, and it was taken in spite of the fact that Mr. Loomis stated on the record at that hearing a year and three months ago, that it was practically an impossibility to prove what part of the damage was caused by the bad weather and what part of the damage was caused by good weather. Notwith-[fol. 384] standing his own statement to that effect, he asked for an adjournment to prove what he said would be impossible to prove. After that—the adjournment was on October 21, 1931—I heard nothing for many months. Finally I signed an order for a commission on consent. Then again I heard nothing for a few months, and I wrote, and in June I finally obtained the copy of the order that I had signed months before, and a set of interrogatories which he sought to send with them. In two days after I received his interrogatories—and this was in June—I filed my cross interrogatories. Now, these interrogatories are nothing more than a repetition of the questions that were asked at the depositions de bene esse that were taken when these cases were originally started and were submitted to Judge Thatcher, and which are now before you, and I cannot see how the answers to those depositions will be any different than they were then. However, I waited, and I waited until now, and this is the first I have heard that there is anything being done. I think a year and three months is considerable time to take some depositions.

The Commissioner: It is a long time. Have you any definite word, Mr. Loomis, as to when these other witnesses will turn up and you may take their depositions?

Mr. Loomis: Not that I can say definitely that they will

be back at any precise time, but the Line is in touch with them and have said they were coming back within a short time, which I understood means a few weeks. The probabilities are that their depositions are taken now by this time, I should say, in view of my advices.

[fol. 385] In view of Mr. Joffe's censure, I have only to say that it was due, in large measure, to his delay in bringing on this hearing for a reference.

The Commissioner: I don't think we need go into the question of who is to blame or anything of that kind now, if there is any blame. I think a definite date should be fixed, however, within which you must get back those depositions, and if they are not back by that time, that the case be closed.

Mr. Loomis: May I suggest that that be long enough for me to write abroad and explain the reason?

The Commissioner: I should think the 15th of February ought to be the limit.

Mr. Loomis: I couldn't write abroad and get a reply back by that time.

The Commissioner: That is four weeks, you could get a reply by that time, I should think. What do you say to that, Mr. Joffe?

Mr. Joffe: If that date is definite, and there are no further adjournments.

Mr. Loomis: I am not going to enter into a stipulation of that sort, and under all the circumstances, I think Mr. Joffe is responsible for this delay. He complained about the character of the decree which Judge Thacher entered.

Mr. Joffe: I wish to state I never complained of Judge Thacher's decree.

The Commissioner: I will set it down for the 1st of March peremptorily.

Mr. Loomis: I will take an exception to that, for the purpose of the record, because under the circumstances I do not feel that we should be subjected to those terms, in [fol. 386] view of the fact that the delay responsible for the difficulty in getting the commission executed is, as I view it, and as I have tried to explain heretofore on the record, simply the failure of Mr. Joffe to proceed with the reference for more than two and a half years, and leading me to believe that he was never going to do anything, so that so far as my records were concerned, the case was

closed, the clients understood that the case was closed, it was billed up and everything was finished. Now, at the last moment he brings this on, after more than two and a half years have elapsed, in a last desperate effort to realize something on it. Then I come in and have no testimony, the clients are out of business, and have no agency in New York. I am forced to correspond abroad, the Line has been discontinued, the men are no longer in their employment, but are in different parts of the world. Now, I proceeded with fairly prompt dispatch, and I don't think it lies within the mouth of Mr. Joffe to complain about it.

The Commissioner: I will put it down for the 1st of March peremptorily.

Mr. Loomis: Exception.

The Commissioner: The only ground for an adjournment would be that the testimony had been actually taken and the commission was on its way back. Under those circumstances I would wait until it came back, but if the testimony is not taken by the 1st of March, it will be closed then.

[fol. 387] In United States District Court

[Title omitted]

Before William Parkin, Esq., Special Commissioner

Met pursuant to adjournment, March 1, 1933.
Present as before.

Mr. Loomis: I have to state that the depositions for which the commission was issued out of this Court have now been taken and returned, and I should like to read them into evidence. I would suggest in that connection that there is no particular reason why I should read them now, but have them just marked in evidence, the depositions being the deposition of Captain B. Dulbecco, the master of the Vallescura; the deposition of Salvatore Irrera the first [fol. 388] officer of that steamer; and the testimony of Giuseppi Barone the first officer of the Vallescura—the second witness whose name I read having been what is called the first ship's officer which is apparently the same as second officer—together with the exhibits therein referred to and thereto attached.

The Commissioner: The depositions are deemed read in evidence, and are filed with the Commissioner.

Mr. Loomis: I offer in evidence at this time copy of the log of the previous voyage made by the Vallescura from the other side to Montreal, in which she carried a cargo of Spanish onions.

Mr. Joffe: Objected to as being irrelevant and immaterial, not proven.

The Commissioner: I will admit them in evidence.

Mr. Joffe: I object as not proven.

The Commissioner: Then of course we will mark it for identification.

Copy is to be sent to the stenographer and is to be marked Claimant's Exhibit B.

Mr. Joffe: As I understand this is the Court file, this folder?

Mr. Loomis: Yes.

Mr. Joffe: I noticed yesterday in looking through this file that the deposition of Captain Bartolomeo Dulbecco which is stamped "Filed" on July 11th, 1928 and which deposition was submitted to Judge Thacher at the time this case was tried, has been mutilated in the respect that the testimony which was taken before the Commissioner in Genoa has disappeared, so in order to have the file com-
[fol. 389] plete for the Commissioner, I will offer in evidence copy of the questions and answers which were given to me by Mr. Loomis at the trial when he submitted an original of this document to Judge Thacher in evidence.

Mr. Loomis: Subject to verification of your copy, I have no objection.

Mr. Joffe: It is not my copy, it is Mr. Loomis' copy which he gave me at the time.

The Commissioner: You have no objection?

Mr. Loomis: No, subject to verification that it is a correct copy. It is the first intimation I have had that the original disappeared from the files.

It is marked Libellants' Exhibit 13.

Mr. Joffe: The copy that Mr. Loomis gave me, which is now Libellants' Exhibit 13, did not have attached the exhibits that were with the original at the time.

Mr. Loomis: Are they still attached to the original in the files?

Mr. Joffe: No, the original has nothing of the actual taking——

The Commissioner: What are all those papers?

Mr. Joffe: The papers that were returned by the consul and all they contain.

The Commissioner: Just the formal papers?

Mr. Joffe: A copy of the order—just the formal papers. At the time the deposition came back in 1928 and before it was put in evidence, I examined the deposition myself and made a copy of two of the exhibits in my own handwriting: Exhibit 1 was the cargo plan that was attached, I made a rough copy of it, and Exhibit 3 was the protest which was filed and offered in evidence. This paper which I copied [fol. 390] which was a copy of Exhibit 1—a rough copy, I offer in evidence. I offer in evidence Exhibit 3 which was also a rough copy of the protest that was Exhibit 3 of that deposition in 1928.

Mr. Loomis: I think I shall have to object to those going in because confessedly they are rough copies. In connection with my objection I will search my files to see whether I do not have exact copies, if I have I will be glad to furnish those exact copies to Mr. Joffe, but I don't think we should admit what are confessedly rough copies.

Mr. Joffe: I have no objection if Mr. Loomis has accurate copies to putting them in evidence in substitution if necessary for those that I have offered, but I do insist that until produced, my records should go in, and if Mr. Loomis wishes I will take the stand and testify to those copies.

Mr. Loomis: No necessity for that—my point is that they are as you say your rough copies.

Mr. Joffe: They are accurate in substance.

Mr. Loomis: That isn't quite enough.

The Commissioner: Mark them for identification until we see whether Mr. Loomis can produce accurate copies.

Mr. Loomis: Further, as I understand, all of those papers are in evidence in the case on the merits so I do not understand why they should be marked here.

Mr. Joffe: They are only marked here so that the Commissioner should have a complete file and so that we may refer to those depositions and quote them to the Commissioner in our briefs.

Mr. Loomis: I think we could probably stipulate on the [fol. 391] basis of the actual copies in our office as to what they were without putting in evidence things that are already in evidence in the main case.

Mr. Joffe: I am happy to receive any copies Mr. Loomis has. I am trying to make a complete record for the Commissioner; I only learned of this loss yesterday afternoon when I went to look at the file.

The Commissioner: Mark them for identification until we see if Mr. Loomis produces the copies which he knows to be accurate.

(They are marked Libellants' Exhibits 14 and 15 for Identification.)

Mr. Loomis: In that same connection may I say that a few days ago we were called upon by the Clerk of the District Court after we had been apprised that depositions of these three witnesses had been returned, and the clerk then told us they had disappeared from the files and couldn't be found. I see this morning they have been found.

Mr. Joffe: In view of Mr. Loomis' statement I wish to state that I was the one who reported the loss of those deposition to both the clerks and Mr. Follmer, the chief clerk, and that I even went to the trouble of coming up to the Commissioner to see if they had by chance come to him; it was at my request that diligent search was made of all the files to finally disclose where those lost depositions were.

Mr. Loomis: Suppose you state for the record where they were.

Mr. Joffe: I was informed by the clerk that they had no recollection of ever filing them, they had disappeared from [fol. 392] the file room and never reached the receiving room, but ultimately a week after my request for a search, they were found in the receiving room in the wrong file; I think the file number was 109109, whereas they should have been in 91109.

Mr. Loomis: We had copies of the same and if they had not been found we would have offered the copies which came to us direct from the consul.

The Commissioner: Mr. Joffe is to file his first brief not later than March 15th, 1933; Mr. Loomis is to have a week after he gets Mr. Joffe's brief, and Mr. Joffe is to have a week after receiving Mr. Loomis' reply in which to file final brief.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Deposition of Bartolomeo Dulbecco, former master of the steamship Vallescura, taken at Trieste, Italy, on the [fol. 393] 4th day of February, 1933, in question and answer form:

Q. 1. State (a) your full name; (b) age; (c) address; and (d) occupation.

A. (a) Bartolomeo Dulbecco; (b) Fifty-five; (c) Via Parasio 1, Imperia, Italy; (d) Master mariner.

Q. 2. (a) State whether you were connected with the steamship Vallescura in the months of November and December, 1925; (b) If so in what capacity.

A. (a) Yes; (b) In command.

Q. 3. You are about to give testimony in connection with a voyage of the steamship Vallescura during the months of November and December, 1925, and particularly with regard to a shipment of onions from Gandia and Denia, Spain, to the port of New York, which onions were damaged through lack of ventilation during the voyage. A decree has been entered herein ordering that the libellants recover "such damage sustained by it as was caused by closing the hatches and ventilators of the vessel at night during good weather." If you are unable to answer from your own recollections any of the interrogatories addressed to you herein, you may refresh your memory from reports, memoranda or other records which you may have kept in the position which you held at the time in question. (a) State whether you remember the shipment to which reference is made; (b) State the number of nights on which the ventilators were closed during good weather; (c) Give the dates and the number of hours during which the ventilators were closed at night during good weather.

A. (a) Yes; (b) The ventilators were never closed be- [fol. 394] cause it was impossible to close them; (c) The ventilators were never closed.

Q. 4. (a) State the number of nights on which the hatches were closed during good weather; (b) Give the dates and the number of hours during which the hatches were closed at night during good weather; (c) If you have stated in answer to the questions above that the hatches

were closed at any time during the night in good weather, state the manner in which the hatches were closed; (d) State whether the cargo received any ventilation through the hatches when they were closed in the manner described in your answer to the preceding interrogatory.

A. (a) During good weather the hatches were never closed; (b) As I said before the hatches were never closed in good weather; (c) (No answer required); (d) Yes, the cargo had ventilation because the hatches were open during good weather.

Q. 5. Referring to the logbook if necessary of the s/s Vallescura for the voyage in question, (a) State whether the weather was good or bad on November 6, 1925; (b) State whether it was possible to open the hatches and ventilators during that day, and, if not, state how long they were closed; (c) State whether the weather was good or bad on November 7, 1925; (d) State whether it was possible to open the hatches and ventilators during that day, and, if not, state how long they were closed; (e) State whether the weather was good or bad on November 9th and 10th, 1925; (f) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (g) State whether the weather was good or bad on November 11th and 12th, 1925; (h) State [fol. 395] whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (i) State whether the weather was good or bad on November 26th, 27th and 28th, 1925; (j) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (k) State whether the weather was good or bad on November 30th, December 1st, 2nd and 3rd, 1925; (l) State whether it was possible to open the hatches and ventilators during those days, and if not, state how long they were closed.

A. (The witness was permitted to refer to a photostatic copy of the logbook of the S/S Vallescura which was handed to him in the presence of the commissioner by Mario Mazzantini, representative of the Lloyd Mediterraneo Line of Genoa. The copy of the logbook after being proved and subscribed by the witness is attached hereto as Exhibit A); (a) Bad weather; (b) The ventilators were open and each hatch was closed and covered with a tar-

paulin except for the first and last planks. As we were in port it was never necessary to close them completely; (c) On November seventh the weather was bad up to 2:00 P. M. during which time we could do no loading so the hatches were closed in the manner previously stated. We worked from 2:00 P. M. to 8:00 P. M. loading, during which time the hatches were wide open; (d) I have already answered this question; (e) The weather was bad; (f) The ventilators were always open and the hatches were closed in the manner previously stated; (g) On the eleventh the weather was bad and we could not load up to 2:00 P. M. but from [fol. 396] 2:00 P. M. to 8 P. M. we worked with the hatches open. The weather was bad on the twelfth; (h) On the eleventh the hatches were closed up to 2:00 P. M. in the manner previously stated but the ventilators were, as always, open. On the twelfth we did not work and the hatches were closed in the usual manner; (i) The weather was bad on the twenty-sixth and twenty-seventh but was somewhat better on the twenty-eighth; (j) The ventilators were, as always, open but the hatches were completely closed because the water came over the deck; (k) The weather was rainy on November thirtieth and there was very bad weather on December first, second and third; (l) The ventilators were always open and on those days the hatches were completely closed as the sea water came over the deck.

Cross-interrogatories:

X Q. 1. State whether or not you made any notes as to the matters you testified to, at the time you observed them.

A. The only notes I made were those in the logbook.

X Q. 2. If you did make any notes, please hand the notes to the Commissioner and request him to mark them as exhibits. If you do produce any notes, state (a) Is it in your handwriting? (b) When was it made?

A. (a) The logbook is a photostatic copy of the original in my own handwriting; (b) I do not know when the copy was made but the original was made day-by-day on the voyage.

X Q. 3. Has your testimony in this matter been based entirely on your own knowledge?

A. Yes.

X Q. 4. Has your testimony in this matter been based [fol. 397] on what you have heard from others?

A. No.

X Q. 5. Has your testimony in this matter been based upon any reports, memoranda or other records?

A. Only on the copy of the logbook.

X Q. 6. Have you had any conversations with any one respecting your answers to any of the questions which have been addressed to you?

A. No.

X Q. 7. If your answer to the prior cross-interrogatory is that you have had conversations, state what the conversations were, when had, and with whom they were had. (No answer required to the seventh cross-interrogatory.)

X Q. 8. Have you received any letters or other writings from anyone with respect to the testimony in this matter?

A. Yes, I received various letters requesting me to give testimony.

X Q. 9. If your answer to the prior cross-interrogatory is that you have, please hand the letters or writings to the Commissioner and request him to mark them as exhibits.

A. I haven't the letters with me as they were sent to my home in Imperia.

X Q. 10. Have you been unable to answer any interrogatories from your own recollection?

A. Yes, it was necessary for me to refer to the copy of the logbook.

X Q. 11. Have you used any reports, memoranda, notes or other records in testifying in this matter?

A. The only document which I have referred to has been the copy of the logbook.

X Q. 12. If you stated in the answer to the prior cross-interrogatory that you have, hand such reports, memoranda, notes or other records to the Commissioner and re- [fol. 398] quest him to mark them as exhibits, and state as to each report, memorandum, note or other record: (a) whether it is in your handwriting; (b) When was it made? (c) Where was it all these years? (d) Who gave it to you?

A. (a) It is a true photographic copy of the logbook which was written in my own — know but it was not in my possession; (d) I re- *know but it was not in my possession; (c) I* received the photographic copy of the logbook from Mario Mazzantini, a representative of the Lloyd Mediter-

raneo of Genoa, today, in the American Consulate at Trieste.

X Q. 13. Have you testified from your unaided recollection?

A. Yes, except for reference to the copy of the logbook.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Deposition of Salvatore Irrera, former Second Officer of the steamship Vallescura, taken at Messina, Italy, on the [fol. 399] 1st day of February, 1933, in question and answer form:

Q. 1. State (a) your full name; (b) age; (c) address; and (d) present occupation.

A. (a) Salvatore Irrera; (b) Forty years old; (c) Villaggio Pace, Messina, Italy; (d) First Officer (ship's officer).

Q. 2. (a) State whether you were connected with the s/s Vallescura in the year 1925, particularly in the months of November and December; (b) If so, in what capacity; (c) In general, what were your duties in relation to the cargo; (d) How long have you been going to sea; (e) What certificates, if any, do you hold; (f) How long have *have* you held such certificates?

A. (a) Yes; (b) Second Officer; (c) Assistant of First Officer; (d) Twenty-three years; (e) Officer certificate from the "Capitaneria di Porto" of Messina (Messina Harbor Office) and diploma from Nautical Institute; (f) Certificate from Harbor Office obtained nineteen years ago; diploma from Nautical Institute five years ago.

Q. 3. You are about to give testimony in connection with the voyage of the steamship Vallescura during the months of November and December, 1925, and particularly with regard to a shipment of onions from Gandia and Denia, Spain, to the port of New York, which onions were damaged through lack of ventilation during the voyage. A decree has been entered herein ordering that the libellants recover "such damage sustained by it as was caused by closing the hatches and ventilators of the vessel at night during good weather." If you are unable to answer from

your own recollection any of the interrogatories addressed [fol. 400] to you herein, you may refresh your memory from reports, memoranda or other records which you may have kept in the position which you held at the time in question; (a) State whether you remember the shipment to which reference is made; (b) Have you ever carried onions in any other ship you have been aboard of, or on any other voyages; (c) Are you familiar with the nature of this cargo and the care that must be taken of it during a sea voyage?

A. (a) Yes; (b) Yes; (c) Yes.

Q. 4. (a) If you state that you do remember the said shipment state whether you personally saw any of it as it came on board or while it was being stowed; (b) State in what holds the onions were stowed; (c) How many ventilators lead into these holds?

A. (a) I followed all the movements of the cargo until it was stowed; (b) Holds Nos. 1, 2 and 5; (c) Four ventilators for each hold.

Q. 5. Describe in detail the method of ventilating the holds wherein the onions were stowed during the voyage.

A. The ventilators which are of the mushroom type prevented seas from entering into the holds and therefore were never closed during the voyage. The ventilation was also made by means of hatches which remained open during clear days and nights. During showery days the hatch covers were tilted open "tent shape" and covered with tarpaulin.

Q. 6. (a) State the number of nights on which the ventilators were closed during good weather; (b) Give the dates and the number of hours during which the ventilators were closed at night during good weather.

A. (a) Always opened; (b) Always opened.

[fol. 401] Q. 7. (a) State the number of nights on which the hatches were closed during good weather; (b) Give the dates and the number of hours during which the hatches were closed at night during good weather; (c) If you have stated in answer to the questions above that the hatches were closed at any time during the night in good weather, state the manner in which the hatches were closed; (d) State whether the cargo received any ventilation through the hatches when they were closed in the manner described in your answer to the preceding interrogatory.

A. (a) During good weather hatches remained always opened; (b) See answer to interrogatory 7 (a); (c) See answer to interrogatory 7 (a); (d) See answer to interrogatory 7 (a).

Q. 8. (a) State whether the weather was good or bad on November 6, 1925; (b) State whether it was possible to open the hatches and ventilators during that day, and, if not, state how long they were closed; (c) State whether the weather was good or bad on November 7, 1925; (d) State whether it was possible to open the hatches and ventilators during that day, and, if not, state how long they were closed; (e) State whether the weather was good or bad on November 9th and 10th, 1925; (f) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (g) State whether the weather was good or bad on November 11th and 12th, 1925; (h) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (i) State whether the weather was good or bad on November 26th, 27th and [fol. 402] 28th, 1925; (j) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (k) State whether the weather was good or bad on November 30th, December 1st, 2nd and 3rd, 1925; (l) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed.

A. (a) Bad weather (see Exhibit A); (b) Ventilators remained opened and hatches were arranged "tent shape" as described in answer to interrogatory No. 5; (c) The weather was bad until two o'clock p. m. (see Exhibit A); (d) Ventilators remained opened; hatches remained as stated under interrogatory 8 (b) until 2.00 p. m. after which they were opened completely; (e) The weather was bad (see Exhibit A); (f) Ventilators remained opened and hatches were arranged "tent shape" as described in answer to interrogatory No. 5; (g) Bad weather on November 11, 1925, until 2.00 p. m; after 2.00 p. m. it stopped raining. Bad weather on November 12, 1925 (see Exhibit A); (h) Ventilators always opened. On November 11th, hatches were arranged "tent shape" but on November 12th, they were closed because we got under way at about noon and the seas were moderately rough. During the

night of November 12th, the hatches were opened because the weather permitted; (i) There was wind, rain and rough sea. (Exhibit A); (j) Ventilators always opened. Hatches closed and covered during November 26th, 27th, and until late in the afternoon of the 28th, when they were arranged "tent shape"; (k) On November 30th, the weather was rainy. On December 1st, there were strong winds and very rough sea. On December 2nd and 3rd, the weather [fol. 403] was the same as on December 1st with the addition of showers at intervals; (l) Ventilators always opened. Hatches closed and covered when shipping seas. At intervals, during calm seas, the hatches were arranged "tent shape."

Cross-interrogatories:

X Q. 1. State whether or not you made any notes as to the matters you testified to, at the time you observed them.

A. I did make notes at the time but due to the lapse of years they have been destroyed.

X Q. 2. If you did make any notes, please hand the notes to the Commissioner and request him to mark them as exhibits. If you do produce any notes, state: (a) Is it in your handwriting; (b) When was it made?

A. See answer to Cross-Interrogatory No. 1; (a) The notes were in my handwriting; (b) At the time.

X Q. 3. Has your testimony in this matter been based entirely on your own knowledge?

A. Entirely on my own knowledge.

X Q. 4. Has your testimony in this matter been based on what you have heard from others?

A. No.

X Q. 5. Has your testimony in this matter been based upon any reports, memoranda or other records?

A. Upon ship's log book.

X Q. 6. Have you had any conversations with anyone respecting your answers to any of the questions which have been addressed to you?

A. No.

X Q. 7. If your answer to the prior cross-interrogatory [fol. 404] is that you have had conversations, state what the conversations were, when had, and with whom they were had.

A. See answer to cross-interrogatory No. 6.

X Q. 8. Have you received any letters or other writings from anyone with respect to the testimony in this matter?

A. Only those marked "Exhibit B."

X Q. 9. If your answer to the prior cross-interrogatory is that you have, please hand the letters or writings to the Commissioner and request him to mark them as exhibits.

A. See answer to cross-interrogatory No. 8.

X Q. 10. Have you been unable to answer any interrogatories from your own recollection?

A. Yes.

X Q. 11. Have you used any reports, memoranda, notes or other records in testifying in this matter?

A. Yes. Ship's log book (Exhibit A).

X Q. 12. If you stated in the answer to the prior cross-interrogatory that you have, hand such reports, memoranda, notes or other records to the Commissioner and request him to mark them as exhibits, and state as to each report, memorandum, note or other record: (a) Whether it is in your handwriting; (b) When was it made? (c) Where was it all these years? (d) Who gave it to you?

A. See answer to cross-interrogatory No. 11. (a) No; (b) At the time; (c) The original deposited with the steamship company. A photographic copy thereof—Exhibit A—received by me this morning; (d) The inspector of the company, Mr Mario Questa.

X Q. 13. Have you testified from your unaided recollection?

A. No. Aided by the ship's log book.

[fol. 405] IN UNITED STATES DISTRICT COURT

[Title omitted]

Deposition of Giuseppe Barone, former Chief Officer of the steamship Vallescura, taken at Genoa, Italy, on the 22nd day of September, 1932, in question and answer form:

Q. 1. State (a) your full name; (b) age; (c) address, and (d) present occupation.

A. (a) Giuseppe Barone; (b) age, 41; (c) Via Musei 75, Brescia, Province of Brescia, Italy; (d) representative.

Q. 2. (a) State whether you were connected with the s/s Vallescura in the year 1925, particularly in the months of

November and December; (b) If so, in what capacity? (c) In general, what were your duties in relation to the cargo? (d) How long have you been going to sea? (e) What certificates, if any, do you hold? (f) How long have you held such certificates?

A. (a) Yes; (b) First Officer; (c) Complete surveyance [fol. 406] of loading and unloading; (d) Seven or eight years; (e) Diploma from the Leghorn Nautical School, and Authorization from the Italian Government to command ships on any voyage, Captain's license; (f) The Diploma in 1911, and the Authorization in 1921.

Q. 3. You are about to give testimony in connection with a voyage of the steamship Vallescura during the months of November and December, 1925, and particularly with regard to a shipment of onions from Gandia and Denia, Spain, to the port of New York, which onions were damaged through lack of ventilation during the voyage. A decree has been entered herein ordering that the libellants recover "such damage sustained by it as was caused by closing the hatches and ventilators of the vessel at night during good weather." If you are unable to answer from your own recollection any of the interrogatories addressed to you herein, you may refresh your memory from reports, memoranda or other records which you may have kept in the position which you held at the time in question. (a) State whether you remember the shipment to which reference is made; (b) Have you ever carried onions in any other ship you have been aboard of, or on any other voyages? (c) Are you familiar with the nature of this cargo and the care that must be taken of it during a sea voyage?

A. (a) Yes; (b) No, no other ship, but one previous voyage on Vallescura; (c) Yes. I was familiar with the care to be taken as I had also undertaken a previous journey on the Vallescura which had cargo of onions.

Q. 4. (a) If you state that you do remember the said [fol. 407] shipment state whether you personally saw any of it as it came on board or while it was being stowed; (b) State in what holds the onions were stowed; (c) How many ventilators lead into these holds?

A. (a) Yes; (b) In No. 1, 2 and 5 holds; (c) Four ventilators into each hold.

Q. 5. Describe in detail the method of ventilating the holds wherein the onions were stowed during the voyage.

A. By means of ventilators and the opening of the hatches. The ventilators were always kept open and the hatches were closed only in case of bad weather, when the sea swept on deck. In case of bad weather without sea sweeping on deck the hatches were partially closed leaving open the lids of fore and aft and covering with tarpaulin so that air could circulate without allowing rain to enter.

Q. 6. (a) State the number of nights on which the ventilators were closed during good weather; (b) Give the dates and the number of hours during which the ventilators were closed at night during good weather.

A. (a) Ventilators always open; (b) Ventilators were always kept open.

Q. 7. (a) State the number of nights on which the hatches were closed during good weather; (b) Give the dates and the number of hours during which the hatches were closed at night during good weather; (c) If you have stated in answer to the questions above that the hatches were closed at any time during the night in good weather, state the manner in which the hatches were closed; (d) State whether the cargo received any ventilation through the hatches when they were closed in the manner described in your answer to the preceding interrogatory.

A. (a) In good weather the hatches were always kept [fol. 408] open during the day and at night lids were placed over the hatches in gabled roof fashion and a tarpaulin placed over the lids so that air could circulate without allowing humidity (dew) to penetrate; (b) Never closed; (c) Never closed; (d) The covering described above was put on in such a way that air could circulate beneath it, therefore, cargo was always ventilated.

Q. 8. (a) State whether the weather was good or bad on November 6, 1925; (b) State whether it was possible to open the hatches and ventilators during that day, and, if not, state how long they were closed; (c) State whether the weather was good or bad on November 7, 1925; (d) State whether it was possible to open the hatches and ventilators during that day, and, if not, state how long they were closed; (e) State whether the weather was good or bad on November 9th and 10th, 1925; (f) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (g) State whether the weather was good or bad on November

11th and 12th, 1925; (h) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (i) State whether the weather was good or bad on November 26th, 27th and 28th, 1925; (j) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed; (k) State whether the weather was good or bad on November 30th, December 1st, 2nd and 3rd, 1925; (l) State whether it was possible to open the hatches and ventilators during those days, and, if not, state how long they were closed.

[fol. 409] A. (a) On November 6, 1925, the weather was bad; (b) The ventilators were always open, but the hatches were kept in such a manner as to keep cargo dry, that is, lids put over in gabled roof fashion and over them (the lids) a tarpaulin (waxed cover) as was done during the night in bad weather. See Exhibit "B." (c) On the morning of the 7th November weather was bad, but work was resumed at 2 p. m. on the same day; (d) Ventilators were always open and hatches were entirely opened at 2 p. m. on November 7th, thus hatches were partially covered for a day and a half; (e) On November 9th and 10th, 1925, weather was bad and no loadings were made; (f) Ventilators were always open, but hatches were arranged as described above (c); (g) On the 11th November, 1925, weather was bad but at 2 p. m. work was resumed; 12th weather was bad; (h) Ventilators were always open, but hatches arranged as above described; (i) November 26th, 27th, weather bad, but on the 28th improvement; (j) During these days the ventilators were always open but the hatches were entirely closed; (k) Weather bad; waves sweeping over the ship; (l) Ventilators kept open but hatches entirely closed.

Cross-interrogatories:

X Q. 1. State whether or not you made any notes as to the matters you testified to, at the time you observed them.

A. I kept notes in my ship's diary but I no longer have this diary.

X Q. 2. If you did make any notes, please hand the notes to the Commissioner and request him to mark them as [fol. 410] exhibits. If do produce any notes, state: (a) Is it in your handwriting? (b) When was it made?

A. I no longer have the notes.

X Q. 3. Has your testimony in this matter been based entirely on your own knowledge?

A. Yes.

X Q. 4. Has your testimony in this matter been based on what you have heard from others?

A. No.

X Q. 5. Has your testimony in this matter been based upon any reports, memoranda or other records?

A. My testimony in this matter is based on my memory and from details of the Vallescura journal.

X Q. 6. Have you had any conversations with anyone respecting your answers to any of the questions which have been addressed to you?

A. Only with Lloyd Mediterraneo.

X Q. 7. If your answer to the prior cross-interrogatory is that you have had conversations, state what the conversations were, when had, and with whom they were had.

A. I arrived in Genoa today, I went to the Lloyd Mediterraneo and there I had conversation with Signor Mazzantini (Secretary) with regard to this Commission.

X Q. 8. Have you received any letters or other writings from any one with respect to the testimony in this matter?

A. No, apart from the letter of the Lloyd Mediterraneo instructing me to come to Genoa for this Commission.

X Q. 9. If your answer to the prior cross-interrogatory is that you have, please hand the letters or writings to the Commissioner and request him to mark them as exhibits.

A. Letter is offered here. Exhibit "C."

X Q. 10. Have you been unable to answer any interrogatories from your own recollection?

[fols. 411-418] A. I have refreshed my memory as regards dates from the ship's journal.

X Q. 11. Have you used any reports, memoranda, notes or other records in testifying in this matter?

A. I have only referred to ship's journal.

X Q. 12. If you stated in the answer to the prior cross-interrogatory that you have, hand such reports, memoranda, notes or other records to the Commissioner and request him to mark them as exhibits, and state as to each report, memorandum, note or other record: (a) Whether it is in your handwriting; (b) When was it made? (c) Where was it all these years? (d) Who gave it to you?

A. Ship's journal is offered. Exhibit "D."

X Q. 13. Have you testified from your unaided recollection?

A. (a) The ship's journal attached is copied from a photograph of the original in the possession of Lloyd Mediterraneo; (b) Lloyd Mediterraneo.

X Q. 14. Have you testified from your unaided recollection?

A. I have testified unaided.

[fol. 419] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPORT OF SPECIAL COMMISSIONER

By interlocutory decree entered on the 26th day of April, 1929, it was referred to me, as Special Commissioner, to ascertain and compute the amount of the libellant's damages herein. I report as follows:

The libel was filed for damages to a cargo of onions shipped on the steamship Vallescura at the port of Gandia, Spain, on November 5th, and at the port of Denia between November 5th and November 12th, 1925. The vessel sailed on November 12th at noon, and arrived in New York on December 5th, 1925, stopping at Gibraltar for coal. On arrival in New York, many of the onions were in an advanced stage of decay. The Court has found that the damage was due to insufficient ventilation during the course of the voyage. The Court has further found that this [fol. 420] insufficient ventilation was due in part, at least, to the unnecessary closing of the ventilators and hatches at night during good weather. The Court further said that possibly some damage resulted from lack of ventilation during periods of the voyage when weather conditions required the closing of hatches and ventilators and that difficulties of proof might arise, but that this should not defeat the recovery of such damage as was caused by the closing of hatches and ventilators at night during good weather.

The order of reference provides that the libellants recover the damage sustained by closing the hatches and ven-

tilators at night during good weather and, in the negative, that the libellants do not recover any damage sustained except such as was caused by closing the hatches and ventilators of the vessel at night during good weather.

The object in making the order in this double form is not clear, but it is not to be presumed that the learned Judge intended to affect or determine the burden of proof.

From the nature of the case, it is impossible to say how much of the decay was due to lack of ventilation during good weather and how much during bad weather;—nor has any attempt been made by either side to make estimates on the subject. All that has been shown is the amount of good and bad weather which occurred between shipment and delivery. In view of the Court's finding that the hatches and ventilators were always closed at night, the testimony of the captain and officers to the contrary, taken by deposition during the reference, must be disregarded.

[fol. 421] The vessel took on part of the onions at Gandia on November 5th. She then went to Denia. The weather was bad on November 6th and on the 7th up to 2 p. m. During this bad weather, the hatches were not entirely closed as the vessel was in port, but a tent-like structure was placed over them allowing of ventilation. On the 7th, the hatches were kept wide open from 2 to 8 p. m. There is no testimony as to the weather on the 8th. On the 9th and 10th, the weather was bad, and on the 11th up to 2 p. m. when the hatches were again opened until 8 p. m. On the 12th, the vessel sailed. It is not entirely clear, but I infer that while the vessel was in port the hatches were covered at night with the tent-like structure. There is no claim that this was not sufficient and no damage is to be accounted for except between November 12th, when the vessel sailed, and December 5th, when she arrived in New York.

During the voyage the only days on which the weather was sufficiently bad to require the closing of the hatches and ventilators were November 26th and 27th, and part of the 28th, November 30th and December 1st, 2nd and 3rd. On November 28th, the tent-like structure was put over the hatches in the afternoon. The only bad nights, therefore, were November 26th, 27th and 30th, and December 1st, 2nd and 3rd. Out of the 23 nights of the voyage, 6 had bad and 17 had good weather.

November nights in the latitude of this voyage from sun-

set to sunrise average about 14 hours long. There were, therefore, 322 night hours during the voyage. During only [fol. 422] 84 of these was the weather bad, leaving 238 when the hatches and ventilators were improperly closed:—or taking day and night together, they were properly closed during 144 hours and improperly closed during 238 hours out of a total of 552. They were open only for 170 hours. It would seem, therefore, that the greater part of the damage must have been due to the improper shutting of the hatches and ventilators.

I have been referred to no authoritative decision in the Supreme Court or in the Circuit Court of Appeals for this Circuit as to the rule for assessing damages in such a case, nor has an independent search discovered any. In Speyer v. The Mary Belle Roberts, 22 Fed. Cas. No. 13,240 where the damage to the cargo was caused mainly by bad stowage and failure to ventilate, but partly by bad weather, Judge Hoffman in California held that the carrier was bound to show what part of the damage was due to bad weather and failing to do so, he must be held responsible for all the damage. In Snow v. Garruth, 22 Fed. Cas. No. 13,144, Judge Sprague divided the damages where they were in part due to the consignee's fault after the cargo was discharged.

In the Shand, 16 Fed. 573, Judge Brown in this District, while apparently conceding that the rule was to throw the whole damage on the carrier where no apportionment was possible, said that this rule was to be followed only as a last resort and by an elaborate calculation worked out an apportionment. The loss was due in part to sea perils and in part to the carrier's negligence. Judge Brown, speaking [fol. 423] of the case of the Mary Belle Roberts, said that where the loss from sea perils was comparatively small, it was just to hold the carrier liable for the whole loss unless he could show how much was to be deducted on account of the minor cause to which he might claim exemption. On that ground it would be proper to hold the vessel liable for all the damage in the present case. It is to be noted, however, that Judge Hoffman, in the Mary Belle Roberts, did not place his decision on the ground suggested by Judge Brown.

In the Young America, 26 Fed. 174, a towage case where a barge was driven on a rock by stress of weather but the damage was increased by her subsequent abandonment by

the tug, Judge Brown divided the damages because of the impossibility of making an apportionment, citing Snow v. Carruth supra, the Shand, supra, and the Max Morris, 24 Fed. 860. This last was a case of injury to a stevedore by negligence in which contributory negligence was shown. It went to the Supreme Court and was the first case establishing the rule for division of damages in Admiralty in such cases (137 U. S. 1).

In the Musselcrag, 125 Fed. 786, where there was no fault on the part of the shipper and the greater part of the loss was due to sea peril, the District Court in California divided the damages.

Where both shipper and carrier are at fault, it is plainly more just to divide the damages, but when only the carrier is at fault, and part of the damage is due to sea perils, it is more in accord with the principles applied in Equity to compel the one whose fault has caused the confusion to [fol. 424] make the proper apportionment or bear the whole loss. That appears to be the rule in England. Carver on Carriage at Sea, 7th Ed., Sec. 78, p. 114, the Rona, 5 Asp. 259. The only case cited by the claimant is The Bencleuch, 10 Fed. (2d) 49, in the Circuit Court of Appeals in this Circuit.

In that case, the vessel had been chartered or requisitioned by the British Government during the War. It was operated by the Cunard Steamship Company which laded her with a cargo of lemons at Messina for New York. The Cunard Company gave bills of lading in its own name which were signed by the master and contained exceptions against liability for breakage and decay. On arrival in New York, more than the usual percentage of breakage and decay was found to have occurred. The ship was libelled, the master appeared as claimant and brought in the Cunard Company, which in turn brought in the stevedores. The District Court discharged the ship and stevedores and held the Cunard Company, saying that the excessive breakage was evidence of bad stowage. The Cunard Company appealed from so much of the decree as exonerated the ship. The Court of Appeals held that the excessive breakage was no evidence of bad stowage, that it may have been due to the character of the boxes, but it made no finding on this point. It held that as no negligence in stowage had been shown, the ship and the Cunard Company were

not liable for damage during the voyage. The cargo was discharged by the Cunard Company in slings which increased the damage. There was further damage done in [fol. 425] transferring the cases from one pier to another. For the additional damage from these two causes, the Cunard Company was held liable, the Court saying that on a new reference the libellant might show this damage, the burden resting on him to distinguish it from that done in the holds.

The case bears no resemblance to the present one. The liability of the Cunard Company as carrier ceased when it began the discharge. It is so stated in the opinion. The bill of lading provided that the cargo was to be delivered from the ship's deck where the company's responsibility was to end. A new relationship of the company to the cargo then arose and it was for negligence in performing this new obligation that the ship was held liable and the burden was on the libellant to establish the damage caused by this negligence. It is not seen that the case furnishes any support for the claimant's argument that when part of the damage has been, or may have been, due to an excepted cause, the libellant must show how much is due to the carrier's negligence.

There does not appear to be any dispute as to the money award if the vessel is liable for all the damage. The libellant is entitled to recover the sound value of the cargo at the time and place of delivery, less the amount received and plus the expenses incurred (The President Arthur, 28 Fed. [2d] 391). After the onions were discharged, some were repacked on the pier. Others were removed to a warehouse in Jersey City and there reconditioned and then sold. All the expenses incurred have been proved and the account is as follows:

[fol. 426]

	Sound Value	
22,433 Crates	@ $ .87	$22,126.71
832 half cases	@ $1.35	1,123.20
		$23,249.91

Amount received after reconditioning		$17,067.14
Expenses		
Lighterage	$521.19	
Cartage	159.65	
Warehouse	336.35	
Labor	3,939.75	
Dumping rotten Onions	125.00	
		$5,081.94
Net Amount Received		$11,985.20
Damages		$11,264.71

The last delivery was on January 14th, 1926, and the libellants claim interest from that date. Interest at 6% to April 14th, 1933 (7 years and 3 months) would be $4,900.13.

The interlocutory decree was entered on April 26th, 1929, but the matter was not brought on before the Special Commissioner until October 21st, 1931, a delay of two years and six months. The interest for this period should not be allowed. The Arpillao, 270 Fed. 426. The Bencleuch, 10 Fed. (2d) 49. This reduces the interest to $3,210.43, and makes the total damages with interest to April 14th, 1933, $14,475.14.

Respectfully submitted, Wm. Parkin, Special Commissioner.

April 13, 1933.

[fol. 427] In United States District Court

[Title omitted]

Claimant's Exceptions to Report of Special Commissioner

The claimant hereby excepts to the report of the Commissioner filed the 17th day of April, 1933, for the following causes, that is to say:

1. Because the Commissioner erroneously permitted the libellant to recover for damage in addition to and other than such as was caused by closing the hatches and ventilators of the vessel at night during good weather contrary to the express terms and intent of the interlocutory decree entered herein.

2. Because the Commissioner erred in disregarding the plain and apparent meaning of the interlocutory decree entered herein and the terms of the order of reference entered herein and thus exceeded the power thereby conferred on said Commissioner by this Court.

[fol. 428] 3. Because the Commissioner erred in deciding that the burden of proof was not effected and determined by the interlocutory decree and by the order of reference entered herein.

4. Because the Commissioner erred in holding that the burden of proof as to how much of the damage was caused by closing the ventilators at night during good weather was not on the libellants.

5. Because the Commissioner erred in holding that the claimant had the burden of proving how much of the damage was caused by closing the hatches and ventilators at night during good weather and how much was due to other causes.

6. Because the Commissioner erred in holding that the Court had conclusively found that the hatches and ventilators were always closed at night.

7. Because the Commissioner erroneously disregarded and gave no effect to the testimony of the captain and officers taken by deposition during the reference.

8. Because the Commissioner erred in refusing to hold that if part of the damage has been or may have been due to an excepted cause and part of the damage has been or may have been due to the fault of the carrier the libellant must show how much is due to the said fault of the carrier if it seeks to recover for that portion.

9. Because the Commissioner erred in entering a decree for libellant after the Commissioner found that it was "im-[fol. 429] possible to say how much of the damage was due to lack of ventilation during good weather and how much during bad weather."

10. Because the Commissioner erred in refusing to hold that the libellant had failed to show how much of the damage was due to the closing of the hatches and ventilators at night during good weather.

11. Because the Commissioner erred in his findings of fact regarding the total number of hours when the hatches and ventilators were improperly closed.

12. Because the Commissioner erred in finding that the greater part of the entire damage sustained by the cargo was due to the improper shutting of the hatches and ventilators.

13. Because the Commissioner erroneously determined the rule for assessing the damages herein.

14. Because the Commissioner erroneously fixed the amount of said damages and further erroneously allowed interest on said amount for a period of four years and nine months.

Loomis & Ruebush, Proctors for Claimant, 70 Pine Street, New York City.

[fol. 430] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 91-109

HARRY SCHNELL and SAMUEL SCHNELL, Co-partners, Doing Business as H. Schnell & Company, Libellants,

against

The Steamship "VALLESCURA", Her Engines, Boilers, etc., LLOYD MEDITERRANEO, Claimant

OPINION, CAFFEY, D. J.

Prior to any action by the commissioner, injury to the onions had been adjudicated. His sole function was to ascertain the quantum of the damage. In performing his duty I feel that he properly applied Speyer v. The Mary Belle Roberts, 22 F. C. No. 13,240, p. 929, and properly refused to apply The Bencleuch, 10 Fed. (2d) 49. I feel also that, in principle, the rule laid down in the Speyer case is strongly supported by Story Parchment Co. v. Paterson Co., 282 U. S. 555.

Even though, however, I were not prepared to go so far, at least I am unable to say, as to the burden of proof or in any other respect, that I am "fully satisfied that error has been committed." In consequence, Admiralty Rule 43½ (286 U. S. 572) obliges me to overrule the exceptions and to confirm the report.

Interest on the principal sum ($11,262.71) from April [fol. 431] 14, 1933, should be added. The stipulated compensation of the commissioner is approved.

Settle order on two days' notice.

Dated, May 11, 1933.

Francis G. Caffey, United States District Judge.

In United States District Court

A. 91/109

Harry Schnell and Samuel Schnell, Co-partners, Doing Business as H. Schnell & Company, Libellants,

against

The Steamship "Vallescura", Her Engines, Boilers, etc., Lloyd Mediterraneo, Claimant

Final Decree—May 17, 1933

An interlocutory decree having been heretofore duly entered in this cause, to wit: on the 26th day of April, 1929, [fol. 432] referring it to William Parkin, Esq., Commissioner, to ascertain, compute and report the amount of damages suffered by the libellants, pursuant to said decree, and the said Commissioner having filed his report on April 13th, 1933, fixing the amount of said damages at Fourteen Thousand Four Hundred Seventy-five and 14/100 ($14,475.14) Dollars, and the claimant-respondent having filed exceptions to said report, and said exceptions having been argued and overruled and the report confirmed by an opinion in writing, dated May 11th, 1933,

Now, on motion of Joffe & Joffe, proctors for the libellants, it is

Ordered, Adjudged and Decreed, that the report of the Commissioner, William Parkin, filed herein, be and it hereby is in all respects confirmed, and that the exceptions thereto be and hereby are overruled, and it is further

Ordered, Adjudged and Decreed, that the libellants, Harry Schnell and Samuel Schnell, co-partners, doing business as H. Schnell & Co., recover of and from The Steamship "S. S. Vallescura", her engines, boilers, etc., and her claimant, Lloyd Mediterraneo, and her stipulators for costs and value, the sum of Fourteen Thousand Four Hundred Seventy-five and 14/100 ($14,475.14) Dollars, the amount of damages so found by the Commissioner, together with the sum of Sixty-three and 82/100 ($63.82) Dollars interest on the principal sum of Eleven Thousand Two Hundred Sixty-two and 71/100 ($11,262.71) Dollars from April 14th, 1933, to the date of judgment, together with the sum of $627.75, the costs of libellants as taxed, making in all the sum of $15,166.71, [fol. 433] with interest thereon until paid, and it is further

Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken therefrom within the time limited and in accordance with the rules and practice of the Courts, the stipulators for costs and value on the part of said claimant-respondent cause the engagement of their stipulations to be performed within such time, or show cause within four days after the expiration thereof, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels, lands and credits to enforce satisfaction of this decree.

Francis G. Caffey, U. S. D. J.

In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal

Sirs: Please take notice that Lloyd Mediterraneo, claimant in the above entitled cause, hereby appeals to the United [fol. 434] States Circuit Court of Appeals for the Second Circuit from the final decree entered herein the 17th day of May, 1933, and from each and every part of said decree.

Dated July 15, 1933.

Yours, &c., Loomis & Ruebush, Proctors for Claimant, 70 Pine Street, New York City.

To Charles Weiser, Esq., Clerk.

Messrs. Joffe & Joffe, Proctors for Libellants, 141 Broadway, New York City.

IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

The foregoing appeal is hereby allowed.
Dated July 17th, 1933.

Wm. Bondy, U. S. D. J.

[fol. 435] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK ...

[Title omitted]

ASSIGNMENT OF ERRORS

The claimant, Lloyd Mediterraneo, hereby assigns error to the proceedings and decree of the District Court in the above entitled action as follows:

1. The District Court erred in finding that damage to any part of the cargo resulted from causes other than the necessary closing of hatches and ventilators during bad weather.

2. The District Court erred in disregarding the testimony of the master of the vessel that the ventilators and hatches were always open during fair weather.

3. The District Court erred in finding that there was negligence in the care and custody of the cargo.

[fol. 436] 4. The District Court erred in finding that the hatches and ventilators were closed at night during good weather.

5. The District Court erred in holding that the libellants had complied with the clause in the bill of lading under which the cargo involved herein was shipped providing that "notice of any claim arising under this bill of lading must be given by the consignee to the steamer's agent at the port of destination within 48 hours after the landing of, or failure to deliver, goods and the claim to be referred within 90 days from the date thereof at the offices of the owner of the steamer."

6. The District Court erred in finding that it was negligent to close the hatches at night in good weather.

7. The District Court erred in permitting the libellant to recover for damage in addition to and other than such as was caused by closing the hatches and ventilators of the vessel at night during good weather contrary to the express terms and intent of the interlocutory decree entered herein on the 26th day of April, 1929.

8. The District Court erred in holding that the burden of proof was not affected and determined by the interlocutory decree entered herein.

9. The District Court erred in holding that the burden of proof as to how much of the damage was caused by closing the hatches and ventilators at night during good weather was not on the libellants.

[fol. 437] 10. The District Court erred in holding that the claimant had the burden of proving how much of the damage was caused by closing the hatches and ventilators at night during good weather and how much was due to other causes.

11. The District Court erred in disregarding and giving no effect to certain testimony of the captain and officers taken by deposition after the trial and on the reference of this matter to the Special Commissioner herein.

12. The District Court erred in overruling the exceptions to the report of the Special Commissioner herein.

13. The District Court erred in entering the decree of libellants on the basis of the Special Commissioner's report after such Special Commissioner had found that it was "impossible to say how much of the damage was due to lack of ventilation during good weather and how much during bad weather."

14. The District Court erred in refusing to hold that the libellants had failed to show how much of the damage was due to the closing of the hatches and ventilators at night during good weather.

15. The District Court erred in affirming the findings of the Special Commissioner with regard to the total num-

ber of hours when the hatches and ventilators were improperly closed.

16. The District Court erred in affirming the finding of the Special Commissioner that the greater part of the en- [fol. 438] tire damage sustained by the cargo was due to the improper shutting of the hatches and ventilators.

17. The District Court erred in erroneously determining the rule for assessing the damage herein.

18. The District Court erred in erroneously affirming the finding of the Special Commissioner as to the amount of damages herein and as to the allowance of interest on said amount for a period of four years and nine months.

19. The District Court erred in holding that Admiralty Rule 43½ obliged the court to overrule the exceptions to the report of the Special Commissioner and to confirm said report.

20. The District Court erred in entering an interlocutory decree in favor of the libellants.

21. The District Court erred in entering a final decree in favor of the libellants.

22. The District Court erred in not dismissing the libel.

Loomis & Ruebush, Proctors for Claimant, 70 Pine Street, New York City.

[fol. 439] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Exhibits

It is hereby stipulated that all the exhibits received in evidence which have not been printed herein or not printed herein in full may be submitted to the Court upon the argument of the appeal herein, and the parties may refer to the same upon their respective briefs and in the oral argument.

Dated, New York, October —, 1933.

Joffe & Joffe, Proctors for Libellant. Loomis & Ruebush, Proctors for Claimant.

[fol. 440] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, October —, 1933.

Joffe & Joffe, Proctors for Libellants. Loomis & Ruebush, Proctors for Claimant.

[fol. 441] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 442] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY SCHNELL and SAMUEL SCHNELL, Copartners, Doing Business as H. Schnell & Co., Libellants-Appellees,

against

The Steamship VALLESCURA, Her Engines, etc., LLOYD MEDITERRANEO, Claimant-Appellant

Before Manton, L. Hand, and Chase, Circuit Judges

In Admiralty. Libel in rem to recover damage to cargo of onions. Appeal by claimant from a decree of the District Court for the Southern District of New York. Reversed.

The libellants obtained an interlocutory decree in the District Court for the damage due to the negligence of the ship in failing to ventilate properly a cargo of onions shipped from Spain aboard the S. S. Vallescura to them as consignees in New York. The cause was referred to a special master to ascertain the damages. All the damage was caused by decay. The bills of lading upon which the onions were shipped contained clauses relieving the ship from liability for damage caused by decay. The special master found that part of the decay was caused by the [fol. 443] negligence of the master of the ship in closing all ventilators and hatches during some nights in good weather and in part to the necessity for closing the ventilators and hatches during bad weather and that it was a practical impossibility to determine from the evidence how much of the damage was due to negligence and how much to a peril of the sea. He held as a matter of law that the ship was liable for all the damage except what it could show was not attributable to its negligence and as the negligence damage could not be separated from that caused otherwise held the ship for all. The District Court entered a decree accordingly and this appeal followed.

Joffe & Joffe, Esqs., Proctors for Libellants-Appellants. Joseph Joffe, Louis Joffe, Esqs., of Counsel.

Loomis & Ruebush, Esqs., Proctors for Claimant-Appellant. Homer L. Loomis, Esq., of Counsel.

CHASE, Circuit Judge:

While there is some dispute on this appeal as to the facts, no serious difficulty is presented on that score. It is undisputed that onions are an extremely perishable cargo and must be adequately ventilated to prevent decay. These onions were laden in part at Gandia and in part at Denia, in Spain, in apparent good order and condition and bills of lading were issued for them on that basis. It is undisputed that the ship encountered rough weather on the voyage which not only delayed her passage but required keep-
[fol. 444] ing the onions without ventilation for periods long enough to cause considerable decay. The master testified in his first deposition that he had the ventilators and hatches closed some nights in good weather and while there was an attempt to deny and explain this, including a claim that the first deposition had been incorrectly translated, the District Court found nevertheless that the onions were negligently deprived of ventilation when the hatches and ventilators were closed in good weather. We accept the facts as found. That there was negligence in needlessly failing to ventilate the onions during a part of the voyage is plain enough. This negligence was related primarily to the care of the cargo and not to the management of the ship. It was, therefore, not an error in management and navigation but a failure in the performance of a duty owed to cargo from which the ship is not relieved from liability under the Harter Act. Andean Trading Co. v. Pacific Steam Navigation Co., 263 Fed. 559; The Edith, 10 Fed. (2) 684; Barr v. International Marine Co., 29 Fed. (2) 26.

The other disputed question of fact has to do with the notice of claim. A written notice was given too late. The libellants introduced proof, which the trial judge believed, that an oral notice of claim was given previously to the wrtten notice and within the time prescribed. This was purely a question of fact depending upon the credibility of witnesses who testified in open court and, as we have often said, a trier of the facts who has seen the witnesses has such a better opportunity to decide such questions than do we that his decision will be upheld unless a mistake is [fol. 445] clearly shown. None has been and the notice of claim is considered sufficiently proved.

It does not follow, however, that the libellants are entitled to recover all of the damage to the onions. In prov-

ing the damage, it appeared that all of it was due to decay. So the same proof which showed damage put it directly within one of the exceptions in the bills of lading. Without more there could be no recovery at all because at least a prima facie defense was made out by the decay exception. The libellants met this prima facie defense by proof of negligent care of the cargo but did not show either that all the decay was due to such negligence or what part was caused by it.

The special master and the district judge who entered the final decree were both of the opinion that the ship was liable for all the damage unless it could show how much was due to causes other than its negligence on the theory that where the negligence of a ship has contributed to the damage to cargo and for that reason alone it has in part lost the benefit of a bill of lading exception it would be more equitable, as the special master said, "to compel the one whose fault has caused the confusion to make the proper apportionment or bear the whole loss." Generally speaking, we have no quarrel with this as an equitable principle. There appear to be paramount considerations in a case of this nature, however, which require a reversal of the result which was reached without giving effect to them.

[fol. 446] Since the proof showed that all the damage was due to decay, it was the kind of the damage, regardless of the cause of the damage, which put it all prima facie within the exception in the bills of lading and to that extent relieved the ship from all liability. Though the burden to bring the damage within the prima facie scope of the exceptions in the bills of lading was on the ship, Clark v. Barnwell, 12 How. 272; The Folmina, 212 U. S. 354, the condition of the onions made other evidence to that end unnecessary. It was then encumbent upon the libellants to prove that the prima facie defense, inherent in decay damage under the exceptions in the bills of lading, was not conclusive by showing that the decay was caused in whole or in part by the ship's negligence. Proof that it had been wholly caused by the ship's negligence would have destroyed the prima facie defense. Proof that the decay was caused in part by such negligence overcame that defense pro tanto. But as the burden was on the libellants to prove not only that the onions had been damaged but to prove recover-

able damage it was necessary to prove what damage was caused by the negligence of the ship. When it is seen that the negligence of the ship becomes important on the question of liability only in so far as it serves to defeat an otherwise good defense to this action, it seems clear that the kind of negligence which must be proved by a preponderance of the evidence is that which has caused decay that, in the language used in Clark v. Barnwell, supra, "might have [fol. 447] been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods." See also, Transportation Co. v. Downer, 11 Wall. 129; Can v. Texas & Pac. Ry. Co., 194 U. S. 427; The Isla de Panay, 292 Fed. 723. When the problem appears in this form it is apparent that proof of negligence in this connection is not a question merely of showing that the ship did not provide adequate ventilation at all times when the weather permitted but of showing in addition that the onions were damaged by decay which would not have occurred in spite of inadequate ventilation in good weather. To prove this necessarily required proof which would show what decay "might have been avoided by the exercise of reasonable skill and attention on the part of the persons conveying the goods". In failing to make such proof, the libellants failed to prove any recoverable damage.

The interlocutory decree provided that the libellants recover only such damage "as was caused by closing the hatches and ventilators of the vessel at night during good weather". The burden of proof resting on the libellants under the law was thus clearly stated in the decree and was not discharged by showing damage which apparently came within the bill of lading exceptions though it might in part have been attributable to the negligence of the ship. Having left the cause of the decay in doubt, the libellants left the ship excused. The Isla de Panay, 292 Fed. 723; The Bencleuch, 10 Fed. (2) 49.

Decree reversed.

[fol. 447a] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry Schnell et al. v. The Steamship Vallescura, etc. (Copy.) Opinion. Chase, Circuit Judge.

[fol. 448] UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 9th day of April, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Harrie B. Chase, Circuit Judges.

HARRY SCHNELL and SAMUEL SCHNELL, Co-partners, etc.,
Libellants-Appellees,

vs.

Steamship "VALLESCURA", LLOYD MEDITERRANEO,
Claimant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry Schnell and Samuel Schnell vs. S. S. "Vallescura". Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 9, 1934. William Parkin, Clerk.

[fol. 450] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 449, inclusive,

contain a true and complete transcript of the record and proceedings had in said Court, in the case of Harry Schnell and Samuel Schnell, Co-partners, etc., Libellants-Appellees, against Steamship "Vallescura", Lloyd Mediterraneo, Claimant-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of June, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 451] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,762. U. S. Circuit Court of Appeals, Second Circuit. Term No. 134. Harry Schnell and Samuel Schnell, Co-partners doing business as H. Schnell & Co., Petitioners, vs. The Steamship "Vallescura," her engines, etc., Lloyd Mediterraneo. Petition for a writ of certiorari and exhibit thereto. Filed June 28, 1934. File No. 134, O. T., 1934.

FILE COPY

FILED
JUN 28
CHARLES ELMORE

Supreme Court of the United States

October Term, 1934

No. 134

HARRY SCHNELL and SAMUEL SCHNELL, co-partners doing business as H. Schnell & Co.
Petitioners
(*Libellants below*)

against

The Steamship VALLESCURA, her engines, etc., LLOYD MEDITERRANEO
Respondents
(*Appellants-Respondents below*)

Petition of H. Schnell & Co., and Brief in Support of Petition for Writ of Certiorari

LOUIS JOFFE
Counsel for Petitioners
141 Broadway
New York City

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Supreme Court of the United States

HARRY SCHNELL and SAMUEL SCHNELL, co-partners, doing business as H. SCHNELL & Co.,

Petitioners,
(Libellants below),

against

The Steamship VALLESCURA, her engines, etc., LLOYD MEDITERRANEO,

Respondents,
(Appellants-Respondents below).

October Term 1934

No.....

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of H. Schnell & Company, a partnership, respectfully shows to this Court as follows:

I. This is a petition to review a final decision and judgment, in admiralty, of the United States Circuit Court of Appeals for the Second Circuit, which reversed the final decree of the District Court for the Southern District of New York, for the libellants, upon which decision and mandate, the libel was dismissed. The opinion of the District Court (THACHER, *J.*) is reported in 43 F. (2d) 247, and found at pages 318-322 of the Record. The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 261 and found at pages 442-445 of the Record.

II. The libellants are importers who sought to recover for damage to onions shipped from Spain to New York aboard the S. S. *Vallescura* to petitioners as consignees (R. pp. 4-9).

The carrier pleaded as a complete defense an exception against "decay" in the bill of lading (R. pp. 16-17); also "perils of the seas" (R. pp. 14-16), and alleged "and was not due to any cause or event arising through any fault or negligence on the part of the said vessel, her master, owner, agents * * *" (R. pp. 16, 17).

III. The District Court (THACHER, *J.*) found that the damage was due to lack of ventilation, to which two causes contributed. One cause was due to the negligence of the ship (R. p. 321):

> "Thus it appears that this notoriously perishable cargo of Spanish onions (*The Buckleigh*, 1929 A. M. C. 449, 450) was deprived of all ventilation during the nighttime, regardless of the state of the weather. Such treatment was obviously ruinous, and must have caused *substantial damage.*" (Italics ours.)

The other cause was (R. p. 322):

> "*It may be* that considerable damage resulted to this cargo from lack of ventilation during periods of the voyage when weather conditions required the closing of hatches and ventilators. If this be true difficulties of proof may arise." (Italics ours.)

The District Court entered an interlocutory decree in favor of the libellants, referring the matter to a special master to ascertain the damage due to the negligence of the ship (R. pp. 323-324).

IV. The report of the Commissioner (Mr. PARKIN, Clerk of the Circuit Court of Appeals) is found at pages

419-426 of the Record. He found that out of a total of 552 hours when the ventilators and hatches were closed, they were *improperly* closed during 23[illegible] hours and *properly* closed during 144 hours, and "It would seem, therefore, that the greater part of the damage must have been due to the improper shutting of the hatches and ventilators" (R. pp. 421-422). He found that "from the nature of the case it is *impossible* to say how much of the decay was due" to each factor (R. p. 420). He decided (R. p. 423):

> "Where both shipper and carrier are at fault, it is plainly more just to divide the damages, but when only the carrier is at fault, and part of the damage is due to sea perils, it is more in accord with the principles applied in Equity to compel the one whose fault has caused the confusion to make the proper apportionment or bear the whose loss."

He found the sound value of the cargo was $23,249.91; that after reconditioning, there was received $17,067.14; that the cost of reconditioning was $5,081.94; so that the damage was $11,264.71; interest was added (R. p. 426).

V. The District Court (CAFFEY, *J.*) confirmed the Commissioner's report in all respects (opinion, R. p. 430), and a final decree was entered for $15,166.71, which included interest and costs (R. pp. 431-433).

VI. The Circuit Court of Appeals stated, "We accept the facts as found" but reversed (MANTON, L. HAND and CHASE, *CJJ.*), on the sole ground that the usual rule of damages is changed by the exception in the bill of lading against "decay." The Court said (R. p. 444):

> "• • • it would be more equitable, as the special master said, 'to compel the one whose

> fault has caused the confusion to make the proper apportionment or bear the whole loss.' Generally speaking, we have no quarrel with this as an equitable principle. There appear to be paramount considerations in a case of this nature, however, which require a reversal of the result which was reached without giving effect to them."

and the paramount consideration (R. p. 444):

> "It was then encumbent upon the libellants to prove that the *prima facie* defense, inherent in decay damage under the exceptions in the bills of lading, was not conclusive by showing that the decay was caused in whole or in part by the ship's negligence. Proof that it had been wholly caused by the ship's negligence would have destroyed the *prima facie* defense. Proof that the decay was caused in part by such negligence overcame that defense *pro tanto*. But as the burden was on the libellants to prove not only that the onions had been damaged but to prove recoverable damage it was necessary to prove what damage was caused by the negligence of the ship."

VII. Your petitioners respectfully submit that this decision and result are

(a) *probably in conflict with the applicable decisions of this Court.*

An exception in a bill of lading does not exonerate the ship from liability for loss or damage from an excepted peril to which its negligence *contributed.*

> *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 at 438;
> *The Edwin I. Morrison*, 153 U. S. 199 at 211;
> *The Mohler*, 88 U. S. 230 at 233;
> *The Portsmouth*, 9 Wall 682 at 684.

Where two wrongdoers in admiralty contributed to cause a damage, the innocent person may recover all the loss from either, though the Court will apportion the damage between the two wrongdoers.

The Atlas, 93 U. S. 302 at 317.

Where the libellant's negligence contributed to cause the damage, he may recover half the loss, though he cannot apportion the amount caused by the ship.

The Max Morris, 137 U. S. 1.

The general law of proof of damages is that where the nature of the case precludes the ascertainment of the amount of damages with certainty, or where it is impossible to distinguish between consequences that were lawfully originated and those unlawfully imposed, the wrongdoer must bear the uncertainty and the entire loss.

Hamilton Shoe Co. v. *Wolf Brothers,* 240 U. S. 251 at 260-262;
Story Parchment Co. v. *Paterson Co.,* 282 U. S. 555 at 563.

This "equitable principle" is applied where the inquiry was "the just indemnity for the wrong" due to the act of the wrongdoer, and in spite of the burden of proof on the injured party.

Hamilton Shoe Co. v. *Wolf Brothers, supra,* p. 261;
Westinghouse Co. v. *Wagner Mfg. Co.,* 225 U. S. 604 at 622.

(b) *the decision and result are in conflict with the decisions in other circuits.*

Where part of the damage was occasioned by an excepted peril for which the ship was not responsible,

and part was caused by its own negligence, to excuse itself for that portion of the loss for which it is not liable, the ship must show how much that portion is, and if it fails to do this, it must be held responsible for the whole damage.

The Mary Belle Roberts, 22 Fed. Cas. No. 13240 (S. D. Cal.);
Gilchrist Transp. Co. v. *Boston Ins. Co.,* 223 Fed. 716 at 722 (C. C. A. 6);
The Olga S., 25 F. (2d) 229 at 230-231 (C. C. A. 5).

Where the shipper's negligence also contributed to cause the damage, the loss is divided between the ship and the consignee, notwithstanding proof of the amount caused by the negligence of the ship is impossible of ascertainment, and notwithstanding exceptions in the bill of lading.

Snow v. *Carruth,* 22 Fed. Cas. No. 13144 (D. C. Mass.) cited with approval in *The Max Morris,* 137 U. S. 1 at 14;
American Finance Co. v. *United States,* 55 F. (2d) 725 (D. C. Cal.).

(c) *the decision and result are in conflict with the entire weight of authority.*

Cases *supra*;
The Shand, 16 Fed. at 573 (S. D. N. Y.);
Brauer v. *Compagnia Navigazione,* 66 Fed. (C. C. A. 2) at 782, affd. 168 U. S. 104;
Maghee v. *Camden etc. R. Co.,* 45 N. Y. 514 at 523;
Condict v. *Grand Trunk R. Co.,* 54 N. Y. 500 at 505.

In England, the rule is that stated in the *Mary Belle Roberts, supra.*

The Rona, 5 Asp. 259, 51 L. T. at 32;
Carver On Carriage At Sea, 7th Ed., Sec. 78, p. 114.

The decision in the case at bar is untenable because it would permit the carrier to contract against its own negligence as in this case, and "lessen, weaken and avoid" its duty of care.

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 at 441;
Harter Act, U. S. Code, Title 46, ch. 8, Sections 190, 191;
The Delaware, 161 U. S. 459 at 471;
Calderon v. *Atlas S. S. Co.*, 170 U. S. 272.

(d) *the decision and result have decided an important question of federal law which should be settled by this Court.*

It has been repeatedly stated to counsel for petitioners by lawyers practicing in admiralty, that the decision of the Circuit Court of Appeals in question is the most important rendered in many years in "Shipping." It is to be remembered that the Second Circuit is in the most active water transportation center of the United States and the Courts therein dispose of the great majority of "shipping" cases.

The exposition of law in the decision establishes a dangerous precedent unless corrected. The decision of the Circuit Court of Appeals goes counter to the established rule of liability and proof of damages, both in admiralty and general law.

We most earnestly urge that the expressions of law be corrected, lest there be established thereby a precedent which will prevent recovery for established negligence in almost all cases of damage to perishable cargo, as it is a practical impossibility to cross the ocean without meeting some rough weather. And logically, the same result must be reached in cases of injury to passengers under similar broad exceptions.

WHEREFORE, your petitioners pray:

(a) That a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day to be designated in said writ, a full and certified transcript of the record and of proceedings in the Circuit Court of Appeals for the Second Circuit in the suit entitled "HARRY SCHNELL and SAMUEL SCHNELL, copartners, doing business as H. SCHNELL & Co. against The Steamship VALLESCURA, her engines, etc., LLOYD MEDITERRANEO, Respondent," to the end that the said suit may be reviewed and determined by this Court as provided in United States Code, Title 28, Judicial Code and Judiciary, Section 350; and that the decision and judgment of the Circuit Court of Appeals for the Second Circuit in the said suit may be reversed by this Honorable Court.

(b) That your petitioners may have such other and further relief as to this Court may seem proper and just, and in conformity with the laws of the United States.

(c) And your petitioners will ever pray, etc.

H. SCHNELL & COMPANY,

by HARRY SCHNELL.

LOUIS JOFFE,
Of Counsel for Petitioners.

State of New York,
County of New York, } ss.:

HARRY SCHNELL, being duly sworn, says that he is a member of the firm of Harry Schnell and Samuel Schnell, copartners, doing business as H. Schnell & Co., the petitioners above named, and that he has read the foregoing petition and knows the contents thereof, and the matters therein set forth are true to the best of his information, knowledge and belief.

HARRY SCHNELL.

Sworn to before me, this 16 day of June, 1934.

LEE SIMON, Notary Public
Kings Co. Clks. No. 925, Reg. No. 5252
N.Y. Co. Clks. No. 906, Reg. No. 58580
Bronx Co. Clks. No. 54, Reg. No. 206838
Queens Co. Clks. No. 1702, Reg. No. 6675
Commission expires March 30, 1935

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

LOUIS JOFFE,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

HARRY SCHNELL and SAMUEL SCHNELL, co-partners, doing business as H SCHNELL & Co., *Petitioners, (Libellants below),* *against* The Steamship VALLESCURA, her engines, etc., LLOYD MEDITERRANEO, *Respondents, (Appellants-Respondents below).*	October Term 1934 No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The Circuit Court of Appeals agrees it would be more equitable "to compel one whose fault has caused the confusion to make the proper apportionment or bear the whole loss" but states that the exceptions against "decay" in the bill of lading makes an inequitable result necessary, and requires a disregard of that equitable principle.

This paramount consideration cannot be the difference between tort and contract, because on the question of damages—*the just indemnity for the wrong*—that difference is irrelevant.

Hetzel v. *Baltimore & Ohio R. Co.*, 169 U. S. at 38.

Nor can it be on the theory that Admiralty law does not follow the common law. That is not so, for where two wrongdoers contribute to cause a damage, the innocent person may recover all the loss from either, though the Court will apportion the damage between the wrongdoers.

The Atlas, 93 U. S. 302 at 317.

Until this decision, in cases of carriers with bill of lading exceptions, the Courts found no paramount consideration which required a departure from the "equitable principle."

In the leading case of the *Mary Belle Roberts*, 22 Fed. Cas. No. 13240 (S. D. Cal.), the Court said at page 930:

> "That the cargo would have sustained, even if properly dunnaged, some injury from the unavoidable effect of sea perils encountered by the vessel, and her consequent leaking, must be admitted. But what would have been the extent of that injury, and how much of the damage is to be attributed to each cause, it is impossible now to ascertain.
>
> "The question thus arises: Is the carrier liable to make good the whole damage sustained, when the proofs show that part of it was occasioned by a cause for which he was not responsible, and part was caused by his own negligence, but he is unable to show how much was due to either cause separately?"

and decided (same page):

> "By his contract, the carrier promised to deliver the goods in like good order and condition as when received, unless prevented from so doing by one of the excepted perils. The cargo being found to be damaged, the burden of proof was

on him to show that the loss was occasioned by one of the causes which, by law and the terms of his contract, afford an excuse for its non-performance. It is not enough that he show that a part of the damage was so caused, while the remainder was caused by his own negligence. To excuse himself for that portion of the loss for which he is not liable, he must show how much that portion is; and, unable to exonerate himself *in toto*, he should establish the degree and extent of the exoneration to which he is entitled.

"If he fails to do this, it seems to me that he must be held responsible for the whole damage."

See also:

Gilchrist Transp. Co. v. *Boston Ins. Co.*, 223 Fed. 716, 720-722 (C. C. A. 6);
The Olga S., 25 Fed. (2d) 229 at 230-231 (C. C. A. 5);
The Shand, 16 Fed. at 573 (S. D. N. Y.);
Brauer v. *Compagnia Navigazione*, 66 Fed. (C. C. A. 2) at 782, affd. 168 U. S. 104.

See also:

The Mohler, 88 U. S. 230 at 233;
The Edwin I. Morrison, 153 U. S. 199 at 211;
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. at 438.

In England, the same rule is stated as to carriers and bill of lading exceptions:

"There being some negligence established, it lies upon the shipowner to distinguish, if he can, what portion of the damage which has arisen did not arise from the negligence which has been established against him * * *" (SIR J. HANNEN in *The Rona*, 51 L. T. at 32, 5 Asp. 259).

Admiralty is the most equitable of all branches of the law. There (unlike at common law) even where the shipper's negligence contributed to cause the damage and proof of the amount caused by the ship is impossible of apportionment, the loss is divided between the ship and the consignee, exceptions in the bill of lading notwithstanding.

Snow v. *Carruth,* 22 Fed. Cas. No. 13144 (D. C. Mass.), cited with approval in the *Max Morris,* 137 U. S. 1 at 14;
American Finance etc. Co. v. *United States,* 55 F. (2d) 725 (S. D. Cal.).

See also:

The Max Morris, 137 U. S. 1.

A cursory examination of the law applicable to exceptions in carrier bills of lading will show, not only that such departure from the "equitable rule" is not necessary, but is illegal and untenable.

The approach to shipping cases is summarized in *The Folmina,* 212 U. S. 354 at 361-362. Primarily, the carrier is liable as an insurer against all loss except only two irresistible causes, as act of God and public enemies. Exceptions against other causes in bills of lading (or other contract) are permitted to the extent "no human skill or diligence can guard against." If goods are received in good order and delivered damaged, the burden lies upon the carrier to show it was occasioned by one of the perils for which it was not responsible. Where the damage is "decay," "the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden (of going forward with the evidence) is upon the shipper to establish that the goods are *removed from its operation because of the negligence of the carrier.*"

Proof that the negligence of the carrier *contributed* to cause the damage, removes the goods from the operation of the exception and the carrier's liability as an insurer is unimpaired.

> "But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed" (GRAY, *J.* in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 at 438).

See to the same effect:

The Edwin I. Morrison, 153 U. S. 199 at 211;
Brauer v. *Compagnia Navigazione*, 168 U. S. 104 at 118;
Gilchrist Transp. Co. v. *Boston Ins. Co.*, 223 Fed. 716 at 720, 722 (C. C. A. 6);
The Olga S., 25 Fed. (2d) 229 at 230, 231 (C. C. A. 5).

If it could be shown that the loss must certainly have occurred from the excepted cause if there had been no negligence, the carrier would be excused, but the burden of proof of this fact would be on the carrier.

Maghee v. *The Camden etc. R. Co.*, 45 N. Y. 514 at 523;
The Portsmouth, 9 Wall. 682 at 684;
Corsar v. *J. D. Spreckles etc. Co.*, 141 Fed. 260 at 264 (C. C. A. 9).

If there is any doubt whether its negligence did or did not contribute, that doubt must be resolved against the carrier and in favor of the shipper.

The Edwin I. Morrison, supra, page 212;
The Mohler, 88 U. S. 230 at 233.

In the case at bar, there is no doubt, because the District Court found the negligence of the ship contributed to the excepted peril, and its finding and that of the Commissioner on the facts have not been disturbed.

The ship claiming the benefit of conditional exception to its primary liability, has the burden of proof that the exception was fulfilled. Having failed to prove its defense, its liability as an insurer is unimpaired.

Galveston H. & S. A. Ry. Co. v. *Wallace,* 223 U. S. 481 at 492;
The Mohler, supra (88 U. S. 230 at 233);
Condict v. *Grand Trunk R. Co.,* 54 N. Y. 500 at 505;
Cases *supra.*

The ship, in the case at bar, pleaded the exception against "decay" as a complete defense (R. pp. 16-17) and alleged (R. p. 17) that it "was not due to any cause or event arising through any fault or negligence on the part of the vessel, her master, owner, agents or representatives * * *." But even if a partial exemption under an exception is permitted, and even were it pleaded as a partial defense, the ship has failed to sustain its burden of proof of the extent of its partial defense.

The Mary Belle Roberts, supra, 22 Fed. Cas. No. 13240;
The Rona, supra, 5 Asp. 259, 51 L. T. at 32.

The relation of carrier and the nature of exceptions in bills of lading, therefore, emphasize and require the application of the "equitable principle," not its abrogation.

Let us examine the exception clause in the bill of lading to see if there is some novel provision which would permit the carrier to escape the consequences of its negligence, as determined by the admiralty and common law.

The pertinent clause is No. 3 and provides, as far as it is applicable (R. p. 296):

> "and not accountable for loss or damage resulting from stowage, sweating * * * decay * * * however caused."

First, there is nothing therein to change the general rule.

Second, the clause *as it stands* is illegal and void, because it is unlawful to insert clauses which excuse the carrier from "loss or damage" arising from "negligence" in "care" of the cargo, or whereby such obligation to "care" for the cargo "is in anywise lessened, weakened or avoided" (*Harter Act*, U. S. Code of Laws, title 46, ch. 8, sec. 190, 191).

> *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 at 441;
> *The Delaware*, 161 U. S. 459 at 471;
> *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272.

And the Court will not read into the clause anything to change its plain, unequivocal language to make it legal, but will declare the entire clause void (*Calderon* case, *supra*, p. 279; *Woodbury* v. *Cincinnati, etc. Ry. Co.*, 40 Fed. 731 at 735, 738 (C. C. E. D. Tenn.); see also *Nicholas* v. *N. Y. etc. R. Co.*, 89 N. Y. 370 at 372).

Third, if the Court finds the language ambiguous, and will construe the clause or the words "however caused," it will do so "most strongly" in favor of the shipper and "most strongly against" the carrier which prepared the bill of lading (*Texas & Pac. R. Co.* v. *Reiss*, 183 U. S. at 626).

Thus, the Court may construe those words as did this Court in *Liverpool Steam Co.* v. *Phenix Ins. Co., supra* (129 U. S. at 441) or in *The Folmina, supra* (212 U. S. at 361)—paraphrasing:

> "however caused" means where "no human skill or diligence can guard against."

Or, as in *The Edwin I. Morrison, supra* (153 U. S. at 211), or in *Brauer* v. *Compagnia Navigazione, supra* (168 U. S. at 118)—paraphrasing:

> "however caused" means except where "the ship's negligence or that of their servants contributed."

Or, as in the case of *Clark* v. *Barnwell*, 12 How. at 280—paraphrasing, as did the Circuit Court of Appeals in the case at bar:

> "however caused" means unless it "might have been avoided by the exercise of reasonable skill and attention on the part of the" carrier.

This last interpretation is not the most favorable to the shipper, not the interpretation given in the ship's own answer (R. p. 17), but notwithstanding, it will not prevent recovery in this case because a "substantial" part of the damage admittedly could have been avoided by due care on the part of the carrier. It is still a defense of a conditional exception to its liability and the burden of proof is on the ship to fulfill the condition and defense in whole or, if permitted, in part. This burden it has not sustained (cases, *supra*).

Let us, however, assume that the burden is on the shipper to show the amount of the damage caused by the negligence of the carrier. It is determined by the well established rules of law applicable to the burden

of proof of damages, both in general law and in admiralty. One of such rules is that where, from the nature of the case, it seems impossible to distinguish between consequences due to the negligence of the wrongdoer and consequences not due to his negligence, the wrongdoer must bear the entire loss rather than the innocent party, or make the separation himself.

> *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251 at 260-262;
> *Westinghouse Co.* v. *Wagner Mfg. Co.,* 225 U. S. 604 at 622;
> *Jenkins* v. *Penn. R. Co.,* 67 N. J. L. 331 at 336;
> *Story Parchment Co.* v. *Paterson Co.,* 282 U. S. 555 at 563-565;
> *Mary Belle Roberts, supra* (22 Fed. Cas. No. 13240).

As stated by the Court in *Hamilton Shoe Co.* v. *Wolf Brothers, supra,* by Mr. Justice PITNEY, at page 261:

> "But, as pointed out in the *Westinghouse Case* (p. 618), there is a recognized exception where the plaintiff carries the burden of proof to the extent of showing the entire profits, but is unable to apportion them, either because of the action of the wrongdoer in confusing his own gains with those which belong to plaintiff, or because of the inherent impossibility of making an approximate apportionment. There, 'on established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong.' "

and again:

> "Certainly, no formula is suggested by which it could be accomplished."

In the *Westinghouse* case, *supra,* this Court by Mr. Justice LAMAR said at page 622:

> "It may be argued that, in its last analysis, this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate apportionment. If then the burden of separation is cast on the defendant it is one which justly should be borne by him, as he wrought the confusion."

In the case at bar, the carrier contended before the Commissioner to assess damages that apportionment was a "practical impossibility" (R. p. 326). The Commissioner, though he computed that the ventilation was negligently cut off 238 hours and properly cut off 144 hours (R. p. 422), also found that "from the nature of the case it was impossible" to apportion the damage (R. p. 420). The District Court agreed (R. p. 430), and the Circuit Court accepted the facts as found (R. pp. 442-443). "Certainly no formula is suggested by which it could be accomplished" (*Hamilton Shoe Co.* v. *Wolf Bros., supra,* p. 261). If there was a formula, it was the duty of the Circuit Court to send the case back for apportionment (*Dowagiac Mfg. Co.* v. *Minnesota Plow Co.,* 235 U. S. 641 at 650, 651) which it refused to do.

Where the nature of the case precludes the apportionment of the damages with certainty, the presumption of law is that the negligence caused the entire damage, and that the injured party has sustained his proof of damages, and whatever uncertainty there is must be borne by the wrongdoer (cases *supra*). Or, if the negligence of the injured party contributed, he recovers half the damages in admiralty (*The Max Morris,* 137 U. S.

1, citing with approval at page 14, *Snow* v. *Carruth, supra,* 1 Sprague 324, a carrier shipper case; *The Eugene F. Moran,* 212 U. S. 466 at 476).

Just what interpretation must be given to the words "however caused," to effect the expression of law stated by the Circuit Court of Appeals, we need not consider. It is clearly not the most favorable to the shipper, counter to the established rules of law, and it is illegal because it will actually result, in this case (*Chicago etc. Ry. Co.* v. *McCaul-Dinsmore Co.,* 253 U. S. 97), to relieve the carrier from "loss or damage arising from negligence" and "lessen, weaken or avoid" its obligation to care for the cargo (*Harter Act*; see *The Max Morris, supra* [137 U. S. 1] at page 14.)

As this Court, by Justice SUTHERLAND, said in the case of *Story Parchment Co.* v. *Paterson Co., supra,* at page 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

LOUIS JOFFE,
Counsel.

New York,
June, 1934.

FILE COPY

OCT 29

CHARLES ELM

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1934

No. 134

HARRY SCHNELL and SAMUEL SCHNELL, copartners, doing business as H. SCHNELL & COMPANY
Petitioners

against

THE STEAMSHIP VALLESCURA, her engines, boilers, etc.

LLOYD MEDITERRANEO
Respondents

BRIEF FOR PETITIONERS

JOSEPH JOFFE
LOUIS JOFFE
Counsel for Petitioners

THE CHARLES WATSON RUSSELL PRESS, INC.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,—1934.

HARRY SCHNELL and SAMUEL SCHNELL, co-partners, doing business as H. SCHNELL & COMPANY,

Petitioners,

against

Steamship "VALLESCURA", her engines, boilers, etc.,
LLOYD MEDITERRANEO,

Respondents.

BRIEF FOR PETITIONERS

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Official Reports of the Opinions Below:

The opinion of the Circuit Court of Appeals (R. pp. 327-330) is reported in 70 F. (2d) 261. The report of the Special Commissioner (R. pp. 312-317) and the opinion of the Dis-

trict Court confirming his report (R. pp. 319-320) are unreported. The opinion of the District Court upon the trial (R. pp. 247-248) is reported in 43 F. (2d) 247.

Statement of the Grounds on Which the Jurisdiction of the Court is Invoked:

(1) The decree to be reviewed is that of the Circuit Court of Appeals dated April 9, 1934.

The petition for certiorari was filed June 28, 1934 and the writ was granted October 8, 1934.

(2) Jurisdiction is conferred upon this Court by Section 240 of the Judicial Code as amended by the Act of February 13, 1925, U. S. C., Title 28, Section 347, and under Article 3, Section 2, Clause 1 of the Constitution of the United States of America.

Statement of the Case.

The libellants are importers who sought to recover for damage to onions shipped from Spain to New York aboard the *S. S. Vallescura* to petitioners as consignees and purchasers of the bill of lading by bank letter of credit (R. pp. 3-6).

The carrier pleaded as a complete defense an exception against "decay" in the bill of lading (R. p. 11); also "perils of the seas" (R. p. 10); and alleged "and was not due to any cause or event arising through any fault or negligence on the part of the vessel, her master, owner, agents * * *" (R. p. 11).

The evidence of shipment of the onions in good order and condition was given by the shipper in a deposition (R.

pp. 171-181), and by an onion broker (R. pp. 62-64). The bill of lading acknowledged shipment "in apparent good order and condition" (R. p. 228-A).

The evidence of delivery in damaged condition was given by the records of the Department of Health of the City of New York (R. p. 20); an Inspector of Customs of the Federal Government (R. p. 24) and the Department records (R. p. 228-B); an onion broker (R. pp. 66, 70); and one of the libellants (R. p. 37).

The Inspector of Customs testified that the damage due to "decay" was 40 to 50% of the onion cargo (R. p. 24) which was substantiated by the testimony of the onion broker (R. p. 66).

The evidence of the cause of the damage was established by respondent's own testimony, the deposition of Captain DULBECCO of the *S. S. Vallescura,* taken in 1928, to the effect that he kept the ventilators and hatches closed at all times at night (R. p. 227). Respondents' own expert at the trial testified that such conduct on the part of the master was improper care of the onion cargo (R. pp. 124-125).

The District Court (THACHER, J.) found the facts as testified by petitioners, and found that the damage was due to lack of ventilation, to which two causes contributed. One cause was due to negligence of the ship (R. p. 248):

> "Thus it appears that this notoriously perishable cargo of Spanish onions (*The Buckleigh,* 1929 A. M. C. 449, 450) was deprived of all ventilation during the nighttime, regardless of the state of the weather. Such treatment was obviously ruinous, and must have caused *substantial damage.*" (Italics ours.)

The other cause was (R. p. 248):

> "*It may be* that considerable damage resulted to this cargo from lack of ventilation during periods of

> the voyage when weather conditions required the closing of hatches and ventilators. If this be true difficulties of proof may arise." (Italics ours.)

The District Court entered an interlocutory decree in favor of the petitioners, referring the matter to a Commissioner to ascertain the damage due to the negligence of the ship (R. p. 249).

The report of the Commissioner (Mr. *Parkin*, Clerk of the Circuit Court of Appeals) is found at pages 312-317 of the Record. He found that out of a total of 552 hours when the ventilators and hatches were closed, they were *improperly* closed during 238 hours and *properly* closed during 144 hours because of bad weather, and stated, "It would seem, therefore, that the greater part of the damage must have been due to the improper shutting of the hatches and ventilators" (R. p. 314). He found that "from the nature of the case it is *impossible* to say how much of the decay was due" to each factor (R. p. 313). He decided (R. p. 315):

> "Where both shipper and carrier are at fault, it is plainly more just to divide the damages, but when only the carrier is at fault, and part of the damage is due to sea perils, it is more in accord with the principles applied in Equity to compel the one whose fault has caused the confusion to make the proper apportionment or bear the whole loss."

The Commissioner found the sound value of the cargo was $23,249.91; that after reconditioning there was received $17,067.14; that the cost of reconditioning was $5,081.94; so that the damage was $11,264.71; interest was added (R. pp. 316-317).

The District Court (CAFFEY, J.) confirmed the Commissioner's report in all respects (Opinion, R. p. 319), and a

final decree was entered for $15,166.71, which included interest and costs (R. p. 320).

The Circuit Court of Appeals accepted the facts as found by the lower Court (R. p. 328).

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held:

(1) The facts as found by the lower Court were correct (R. p. 328).

(2) The petitioners failed as a matter of law to sustain their burden of proof of damages (R. pp. 329-330).

(3) It reversed the lower Court (MANTON, L. HAND and CHASE, C. JJ.) on the sole ground that the usual rule of damages is changed by the exception in the bill of lading against "decay". The Court said (R. p. 329):

> "* * * it would be more equitable, as the special master said, 'to compel the one whose fault has caused the confusion to make the proper apportionment or bear the whole loss.' Generally speaking, we have no quarrel with this as an equitable principle. There appear to be paramount considerations in a case of this nature, however, which require a reversal of the result which was reached without giving effect to them."

and the paramount consideration (R. p. 329):

> "It was then encumbent upon the libellants to prove that the *prima facie* defense, inherent in decay damage under the exceptions in the bills of lading, was not conclusive by showing that the decay was

caused in whole or in part by the ship's negligence. Proof that it had been wholly caused by the ship's negligence would have destroyed the *prima facie* defense. Proof that the decay was caused in part by such negligence overcame that defense *pro tanto*. But as the burden was on the libellants to prove not only that the onions had been damaged but to prove recoverable damage it was necessary to prove what damage was caused by the negligence of the ship."

Specifications of Error Intended to Be Urged.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

1. In holding that the petitioners failed to sustain their burden of proof of damages and dismissing the libel:

(a) By holding that where damage caused is within an exception in the bill of lading, to which the negligence of the ship has contributed, the ship is nevertheless exempt from liability for loss or damage from said peril, and the cargo owner must prove what damage was not caused by said peril;

(b) By holding that where, from the nature of the case, it seems impossible to distinguish between the consequences due to the negligence of the wrongdoer, and consequences not due to its negligence, the usual equitable rule—the one who has caused the confusion, as against an innocent party, must bear the entire loss—is inapplicable to the case at bar because of the exception in the bill of lading.

POINT I.

The petitioners have sustained their burden of proof as to damages.

The decision of the Circuit Court of Appeals presents no issue of fact, as stated in its opinion, and the Circuit Court of Appeals agrees that it would be more equitable "to compel one whose fault has caused the confusion to make the proper apportionment or bear the whole loss", but states that the exception against "decay" in the bill of lading makes an inequitable result necessary, and requires the disregard of that equitable principle.

This paramount consideration cannot be the difference between tort and contract, because on the question of damages—*the just indemnity for the wrong*—that difference is irrelevant.

Hetzel v. *Baltimore & Ohio R. Co.*, 169 U. S. at 38.

Nor can it be on the theory that Admiralty law does not follow the common law. That is not so, for where two wrongdoers contribute to cause a damage, the innocent person may recover all the loss from either, though the Court will apportion the damage between the wrongdoers.

The "Atlas", 93 U. S. 302 at 317.

In fact, Admiralty is the most equitable of all branches of the law. There (unlike at common law) even where the shipper's negligence contributed to cause the damage, he may recover half the loss, though he cannot apportion the amount caused by the ship.

The Max Morris, 137 U. S. 1.

An examination of the law applicable to exceptions in carrier bills of lading will show, not only that such exceptions do not give rise to paramount considerations requiring a departure from "the equitable rule", but on the contrary, require the enforcement of such equitable rule, so as not to produce an unjust and illegal result.

A.

An exception in a bill of lading does not exempt the ship from liability for loss or damage from an excepted peril to which its negligence contributed.

The holding of the Circuit Court of Appeals to the effect that the exception in the bill of lading continues to exempt the ship from liability, after proof that its negligence contributed to the loss, is contrary to the expressed statement of this Court.

GRAY, J., in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, said at 438:

> "But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea *or other specified perils* does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed." (Italics ours.)

The reason for the rule, as stated above by Judge GRAY, was rationalized by this Court in *The Folmina*, 212 U. S. 354 at 361-362. Primarily, the carrier is liable as an in-

surer against all loss except only two irresistible causes, as act of God and public enemies. Exceptions against other causes in bills of lading (or other contract) are permitted to the extent "no human skill or diligence can guard against". If goods are received in good order and delivered damaged, the burden lies upon the carrier to show it was occasioned by one of the perils for which it was not responsible. Where the damage is "decay", "the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden (of going forward with the evidence) is upon the shipper to establish that the goods are *removed from its operation because of the negligence of the carrier.*"

Proof that the negligence of the carrier *contributed* to cause the damage, removes the goods from the operation of the exception and the exception no longer exempts the carrier from liability for the damage.

> "By the laws of both countries, the ordinary contract of a common carrier by sea involves an obligation on his part to use due care and skill in navigating the vessel and in carrying the goods; and an exception, in the bill of lading, of perils of the sea, or other specified perils, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed." (GRAY, J. in *Compania De Navigacion La Flecha* v. *Brauer*, 168 U. S. 104 at 118.)

See to the same effect:

> *Liverpool Steam Co.* v. *Phenix Ins. Co., supra;*
> *The Edwin I. Morrison*, 153 U. S. 199 at 211;
> *Gilchrist Transp. Co.* v. *Boston Ins. Co.*, 223 Fed. 716 at 720, 722 (C. C. A. 6);
> *The Olga S.*, 25 F. (2d) 229 at 230, 231 (C. C. A. 5).

It is submitted that the above rulings of this Court and of the other circuits are squarely contra to the rule laid down by the Circuit Court of Appeals in the case at bar, to the effect that the exception is only overcome *pro tanto* and continues nevertheless to exempt the ship.

The cases cited by the Circuit Court of Appeals to sustain its statement of the law are all cases where the damage was caused "without negligence or fault on the part of the master or owners", and there was no question considered or discussed involving an excepted peril to which the negligence of the carrier contributed. The cases cited (R. p. 330) are *Clark* v. *Barnwell*, 12 How. 272 (see p. 283); *Transportation Co.* v. *Downer*, 11 Wall. 129 (see pp. 133-134); *Cau* v. *Texas & Pac. Ry.*, 194 U. S. 427 (see p. 432); *The Isla De Panay*, 292 Fed. 723 (see pp. 727-728).

The respondent, in its brief in opposition to the petition for certiorari, attempted to draw a distinction between negligence contributing to excepted perils like "perils of the sea", and negligence contributing to excepted perils like "decay". No such distinction is attempted to be made by the Circuit Court of Appeals or any cited case. This Court, on the contrary, in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, *supra*, and the other cases cited by the petitioners, repeatedly states that the rule of the ship's negligence contributing to excepted perils applies to "perils of the sea *or other specified perils*". There is neither reason nor justice to distinguish, in any case, between perils to which the negligence of the ship contributes; and especially is there no reason in this case, because the real peril involved, the peril to which the negligence of the ship contributed—to cut off ventilation—was no other than a "peril of the sea" and was so stated by the Circuit Court of Appeals (R. p. 327).

And in consequence of its ruling, the Circuit Court of Appeals fell into further error by requiring the cargo owner

"to prove what damage was caused by the negligence of the ship" by "showing in addition, that the onions were damaged by decay which would not have occurred in spite of inadequate ventilation in good weather" (R. p. 330). This statement of the law is contra to the established rule so well stated by Judge ANDREWS in *Maghee* v. *The Camden, etc., R. Co.*, 45 N. Y. 514 at 523:

> "If it could be shown, in such a case, that the loss must certainly have occurred from the same cause, if there had been no default, misconduct or deviation, the carrier would be excused; but the burden of proof of this fact would be upon the carrier. (*Davis* v. *Garrett*, 6 Bing. 716; *Danseth* v. *Wade, supra;* Story on Bailments, *supra;* Abbott on Shipping, 362.)"

See also:

> *The Portsmouth*, 9 Wall. 682 at 684;
> *Corsar* v. *J. D. Spreckels, etc., Co.*, 141 Fed. 260 at 264 (C. C. A. 9).

The statement of law contrary to the above cases laid down by the Circuit Court of Appeals, to the effect that the petitioners left the cause of the damage in doubt by their failure to show that the damage would not have occurred in spite of the negligence of the ship, "though it might in part have been attributable to the negligence of the ship" (R. p. 330), is not supported by the cases cited in its opinion. In the *Isla De Panay*, 292 Fed. 723, the damage was caused "free from negligence" of the ship (p. 728), and there was no question considered or discussed involving an excepted peril to which the negligence of the carrier contributed. In *The Bencleuch*, 10 F. (2d) 49, the damage was caused *entirely* by the negligence of the ship in discharge of the cargo; the damage was *distinguishable*, possible of observation,

physical separation, and was actually *proved* in that case and its companion case on the following page, *The Ellerdale*, 10 F. (2d) 53.

If there is any doubt whether its negligence did or did not contribute, that doubt must be resolved against the carrier and in favor of the shipper.

> *The Edwin I. Morrison, supra,* page 212;
> *The Mohler,* 88 U. S. 230 at 233.

In the case at bar, there is no doubt, because the District Court found the negligence of the ship contributed to the excepted peril, and its finding and that of the Commissioner on the facts have not been disturbed.

The ship, claiming the benefit of conditional exception to its primary liability, has the burden of proof that the exception was fulfilled. Having failed to prove its defense, its liability is unimpaired.

> *Galveston H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481 at 492;
> *The Mohler, supra* (88 U. S. 230 at 233); Cases, *supra.*

In the *Galveston H. & S. A. Ry. Co.* v. *Wallace, supra,* this Court, by LAMAR, J., said at page 492:

> "The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them or explaining why that had not

> been done. This must be so, because carriers not only have better means, but often the only means, of making such proof."

The ship, in the case at bar, pleaded the exception against "decay" as a complete defense (R. p. 11) and alleged (R. p. 11) that it "was not due to any cause or event arising through any fault or negligence on the part of the vessel, her master, owner, agents or representatives * * *." This complete defense the ship admittedly failed to sustain. As was said by DAVIS, J., in *The Mohler, supra,* at page 233:

> "The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment."

But assuming that the ship was permitted to prove a partial defense under its pleading, or in mitigation of damages, the ship has failed to sustain its burden of proof.

> *The Mary Belle Roberts,* 22 Fed. Cas. No. 13240 (S. D. Cal.).

In this leading case, the Court said at page 930:

> "That the cargo would have sustained, even if properly dunnaged, some injury from the unavoidable effect of sea perils, encountered by the vessel, and her consequent leaking, must be admitted. But what would have been the extent of that injury, and how much of the damage is to be attributed to each cause, it is impossible now to ascertain.
>
> "The question thus arises: Is the carrier liable to make good the whole damage sustained, when the proofs show that part of it was occasioned by a cause

for which he was not responsible, and part was caused by his own negligence, but he is unable to show how much was due to either cause separately?"

and decided (same page):

"By his contract, the carrier promised to deliver the goods in like good order and condition as when received, unless prevented from so doing by one of the excepted perils. The cargo being found to be damaged, the burden of proof was on him to show that the loss was occasioned by one of the causes which, by law and the terms of his contract, afford an excuse for its non-performance. It is not enough that he show that a part of the damage was so caused, while the remainder was caused by his own negligence. To excuse himself for that portion of the loss for which he is not liable, he must show how much that portion is; and, unable to exonerate himself *in toto*, he should establish the degree and extent of the exoneration to which he is entitled.

"If he fails to do this, it seems to me that he must be held responsible for the whole damage."

See also:

Gilchrist Transp. Co. v. *Boston Ins. Co.*, 223 Fed. 716, 720-722 (C. C. A. 6);
The Olga S., 25 F. (2d) 229 at 230-231 (C. C. A. 5);
Brauer, et al. v. *Campania Navigacion La Flecha*, 66 Fed. (C. C. A. 2) at 782, affd. 168 U. S. 104.

In England, the same rule is stated as to carriers and bill of lading exceptions:

"There being some negligence established, it lies upon the shipowner to distinguish, if he can, what

> portion of the damage which has arisen, did not arise from the negligence which has been established against him * * *." (*Sir J. Hannen in The Rona,* 51 L. T. at 32, 5 Asp. 259.)

See also:

> *Carver on Carriage at Sea,* 7th Ed., Sec. 78, p. 114.

The rule stated in the above cases explains the form of the decree made by Judge THACHER.

Judge THACHER, having found that the petitioners had sustained the burden of proof of liability, ordered that the petitioners may recover only the damages caused by respondent's negligence.

The Circuit Court of Appeals, in the last portion of its opinion, stated that Judge THACHER indicated the rule of damages announced by it when he provided in his decree "that the libellants recover only such damage as was caused by closing the hatches and ventilators of the vessel at night in good weather." The statement of the Circuit Court is, it is submitted, erroneous.

Judge THACHER could not legally decree to petitioners damages not caused by respondents' negligence. Any other decree would violate the basic principle of damages in civil law, which is the same in tort and contract—*the just indemnity for the wrong* (*Hetzel* v. *Baltimore & Ohio R. R. Co.*, 169 U. S. at 38). The basic and only rule of liability permitted in civil law is that the libellant may recover *and does only recover* the damage caused by respondents' negligence.

Any other decree would foreclose the claimant from distinguishing what portion of the damage which had arisen did not arise from the negligence which has been established against him, and such a decree would be bad.

In delegating that question of damages to the Commissioner, it was for the Commissioner to determine what the proof of damages would show and the law applicable thereto. The latter questions *were not raised or argued before Judge* THACHER *nor decided by him* (R. p. 56) (*Vicksburg* v. *Henson,* 231 U. S. 259).

The District Court, in confirming the Commissioner's report, construed its own interlocutory decree (if construction was necessary) and the law applicable to proof of damages, which was in accordance with the law, as stated by this Court in the *Liverpool Steam Company* case and other cases cited above, that "an exception in the bill of lading of perils of the sea, or other specified perils, does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed".

And on the proof of damages, "it lies upon the shipowner to distinguish, if he can, what portion of the damage which has arisen did not arise from the negligence which has been established against him * * *" (*The Rona, Mary Belle Roberts,* and see other cases, *supra*).

Let us examine the exception clause in the bill of lading to see if there is some novel provision which would permit the carrier to escape the consequences of its negligence, as determined by the Admiralty and common law.

The pertinent clause is No. 3 and provides, as far as it is applicable (R. p. 228-A):

> "and not accountable for loss or damage resulting from stowage, sweating * * * decay * * * however caused."

First, there is nothing therein to change the general rule.

Second, the clause *as it stands*, with the words "however caused", is illegal and void, because it is unlawful to insert clauses which excuse the carrier from "loss or damage" arising from "negligence" in "care" of the cargo, or whereby such obligation to "care" for the cargo "is in anywise lessened, weakened or avoided" (*Harter Act*, U. S. Code of Laws, Title 46, Ch. 8, Secs. 190, 191).

> *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397 at 441;
> *The Delaware*, 161 U. S. 459 at 471;
> *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272.

And the Court will not read into the clause anything to change its plain, unequivocal language to make it legal, but will declare the entire clause void (*Calderon* case, *supra*, p. 279; *Woodburn* v. *Cincinnati, etc., Ry. Co.*, 40 Fed. 731 at 735, 738 [C. C. E. D. Tenn.]; but see *Nicholas, et al.* v. *N. Y., etc., R. Co.*, 89 N. Y. 370 at 372).

Third, if the Court finds the language ambiguous, and will construe the clause or the words "however caused", it will do so "most strongly" in favor of the shipper and "most strongly against" the carrier which prepared the bill of lading (*Texas & Pac. R. Co.* v. *Reiss*, 183 U. S. at 626).

Thus, the Court may construe those words as did this Court in *Liverpool Steam Co.* v. *Phenix Ins. Co., supra* (129 U. S. at 441), or in *The Folmina, supra* (212 U. S. at 361)—paraphrasing:

> "however caused" means against which "no human skill or diligence can guard against".

Or, as in *The Edwin I. Morrison, supra* (153 U. S. at 211), or in *Brauer, et al.* v. *Campania Navigacion, supra* (168 U. S. at 118)—paraphrasing:

> "however caused" means except where "the ship's negligence or that of their servants contributed".

Or, as in the case of *Clark* v. *Barnwell*, 12 How. at 280—paraphrasing, as did the Circuit Court of Appeals in the case at bar:

> "however caused" means unless it "might have been avoided by the exercise of reasonable skill and attention on the part of the" carrier.

This last interpretation is not the most favorable to the shipper, not the interpretation given in the ship's own answer (R. p. 11), but notwithstanding, it will not prevent recovery in this case because a "substantial" part of the damage admittedly could have been avoided by due care on the part of the carrier. It is still a defense of a conditional exception to its liability, and the burden of proof is on the ship to fulfill the condition and defense in whole. The reasoning of the cases is stated by CARDOZO, J., in *May, et al.* v. *Hamburg, etc.*, 290 U. S. at 352:

> "the argument for the respondent loses sight of the value of a uniform rule that will put an end to controversy where the causal relation is uncertain or disputed. Particularly is there need of such a test where the carrier asks to be relieved from liability for conduct which without the benefit of the statute (or contract)* would be an actionable wrong."

This burden it has not sustained (cases, *supra*). Nor has it sustained its burden of proof in mitigation of damages.

Therefore, the relation of ship and cargo and the nature of exceptions in bills of lading, emphasize and require the application of the "equitable principle", and not its abrogation.

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* Words in parentheses ours.

B.

Where the nature of the case precludes the ascertainment of the amount of damages with certainty, or where it seems impossible to distinguish between the consequences that were lawfully originated and those unlawfully imposed, the wrongdoer must bear the uncertainty and the entire loss, or make the separation himself.

Let us, however, assume that the burden is on the shipper to show the amount of the damage caused by the negligence of the carrier. It is determined by the well-established rules of law applicable to the burden of proof of damages, both in general law and in Admiralty. One of such rules is that where, from the nature of the case, it seems impossible to distinguish between consequences due to the negligence of the wrongdoer and consequences not due to his negligence, the wrongdoer must bear the entire loss rather than the innocent party, or make the separation himself.

Hamilton Shoe Co. v. *Wolf Bros.*, 240 U. S. 251 at 260-262;
Westinghouse Co. v. *Wagner Mfg. Co.*, 225 U. S. 604 at 622;
Jenkins v. *Penn. R. Co.*, 67 N. J. L. 331 at 336;
Story Parchment Co. v. *Paterson Co.*, 282 U. S. 555 at 563-565;
The Mary Belle Roberts, supra (22 Fed. Cas. No. 13240);
The "Atlas", 93 U. S. 302 at 317.

Thus, where there are two causes which contribute to effect a damage, and each cause is produced by a different

source, the innocent person may recover the entire loss from either person responsible for a cause, though the Court will apportion the damage between the wrongdoers.

The "Atlas", supra.

As stated by the Court in *Hamilton Shoe Co.* v. *Wolf Brothers, supra,* by Mr. Justice PITNEY, at page 261:

> "But, as pointed out in the *Westinghouse* case (p. 618), there is a recognized exception where the plaintiff carries the burden of proof to the extent of showing the entire profits, but is unable to apportion them, either because of the action of the wrongdoer in confusing his own gains with those which belong to plaintiff, or because of the inherent impossibility of making an approximate apportionment. There, 'on established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong.'"

and again:

> "Certainly, no formula is suggested by which it could be accomplished."

In the *Westinghouse* case, *supra,* this Court by Mr. Justice LAMAR said at page 622:

> "It may be argued that, in its last analysis, this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate

> apportionment. If then the burden of separation is cast on the defendant it is one which justly should be borne by him, as he wrought the confusion."

In the case at bar, the respondent contended and conceded before the Commissioner that apportionment was a "*practical impossibility*" (R. p. 250). The Commissioner, though he computed that the ventilation was negligently cut off 238 hours and properly cut off 144 hours (R. p. 314), also found that "from the nature of the case it was impossible" to apportion the damage (R. p. 313). The District Court agreed (R. p. 319), and the Circuit Court accepted the facts as found (R. pp. 327-328). "Certainly no formula is suggested by which it could be accomplished" (*Hamilton Shoe Co.* v. *Wolf Bros., supra*, p. 261). If there was a formula, it was the duty of the Circuit Court to send the case back for apportionment (*Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641 at 650, 651) which it refused to do.

In Admiralty, there is a further application of this rule and the most liberal known to our law. There, even where the negligence of the injured party contributed to cause the damage, and proof of the amount caused by the ship is impossible of ascertainment, the loss is divided between the parties.

> *The Max Morris*, 137 U. S. 1;
> *The Eugene F. Moran*, 212 U. S. 466 at 476.

And this is the rule between the ship and the cargo owner, *exceptions in the bill of lading notwithstanding.*

> *Snow* v. *Carruth*, 22 Fed. Cas. No. 13144 (D. C. Mass.), cited with approval in *The Max Morris, supra*, page 14;

American Finance, etc., Co. v. *United States*, 55 F. (2d) 725 (S. D. Cal.).

In *The Max Morris, supra*, this Court by BLATCHFORD, J., said at page 14:

> "In *Snow* v. *Carruth*, 1 Sprague, 324, in the District Court for the District of Massachusetts, damage to goods carried by a vessel on freight was attributable partly to the fault of the carrier and partly to the fault of the shipper; and, it being impossible to ascertain for what proportion each was responsible, the loss was divided equally between them.
>
> "All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper."

CONCLUSION.

Where the nature of the case precludes the apportionment of the damages with certainty, the presumption of law is that the negligence caused the entire damage, and that the injured party has sustained his proof of damages, and whatever uncertainty there is must be borne by the wrongdoer. The entire theory of recovery is compensatory and not punitive—there is no recovery for damage not due to the negligence of the wrongdoer.

We submit that a shipowner whose lack of due diligence in the care of the cargo contributes to cause the damage thereto, cannot apportion or qualify his fault against an innocent cargo owner, and certainly cannot impose on the shipper an added burden of apportioning the result of the ship's negligence.

Just what interpretation must be given to the words "however caused", to effect the expression of law stated by the Circuit Court of Appeals, we need not consider. It is clearly not the most favorable to the shipper, counter to the established rules of law, and it is illegal because it will actually result, in this case (*Chicago, etc., Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97), to relieve the carrier from "loss or damage arising from negligence" and "lessen, weaken or avoid" its obligation to care for the cargo (*Harter Act*).

As this Court, by Justice SUTHERLAND, said in the case of *Story Parchment Co.* v. *Paterson Co., supra,* at page 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

The decree of the Circuit Court of Appeals should be reversed.

Dated October 27th, 1934.

Respectfully submitted,

JOSEPH JOFFE,
LOUIS JOFFE,
Counsel for Petitioners.

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 134.

HARRY SCHNELL and SAMUEL SCHNELL, Co-partners, doing business as H. SCHNELL & COMPANY,

Petitioners,

AGAINST

The Steamship VALLESCURA, her engines, boilers, etc.,

LLOYD MEDITERRANEO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioners' recital of facts omits to state certain facts necessarily fatal to the petition, even though the same were otherwise meritorious.

The petition fails to state that the interlocutory decree of the District Court deciding the merits prescribed the rule for the assessment of damages here complained of; that the Commissioner, however, in thereafter assessing the damages, failed and refused to apply that rule; that the District Court, in confirming the Commissioner's report assessing the damages, likewise failed and refused

to apply that rule; that for this failure and refusal of the Commissioner and the District Court to observe the rule so prescribed by the interlocutory decree, among other reasons, the respondent appealed to the Circuit Court of Appeals; *that the petitioners, however, so far from assigning error to the said interlocutory decree on said appeal, accepted the same as prescribing the true rule of damages;* that the Circuit Court of Appeals in reversing the final decree did but enforce against the petitioners the rule of damages so prescribed by the said interlocutory decree and accepted by the petitioners; and that the Circuit Court of Appeals, in refusing to order another reference, and give the petitioners a further chance to attempt to prove their damages according to said rule, did so for two reasons, viz.: First, because of the finding of the Commissioner, *also not excepted to nor otherwise complained of by the petitioners and therefore accepted by the Circuit Court of Appeals as an established fact,* that the damage was of such character that under the rule prescribed by the said interlocutory decree the petitioners could establish no recoverable damage; and, secondly, because *the petitioners in the proceedings before the Commissioner had resolutely refused even to attempt to comply with the rule of damages so prescribed by the said interlocutory decree either by appropriate offers of proof or otherwise.*

The interlocutory decree (Record, p. 324), so far from granting to the petitioners a general recovery of the damages sustained by their cargo of onions, limited their recovery to "such damage sustained by it as was caused by closing the hatches and ventilators of the vessel at night during good weather"; and expressly denied the petitioners a recovery of any other damage whatever by providing that the petitioners should *not* recover "any damages sustained by it, except such damage as was caused by closing the hatches and ventilators of the vessel at night during good weather."

The Commissioner, although finding that "from the nature of the case", it was "impossible to say how much of the decay was due to lack of ventilation during good weather and how much during bad weather" (Record, p. 420, f. 1260), a burden that the petitioners had stubbornly refused to assume (Record, p. 327, f. 980), nevertheless, in violation of the express provisions of the interlocutory decree, found the Vallescura "liable for all the damage" (Record, p. 425, f. 1275); for which a final decree was entered accordingly (Record, p. 432).

The Circuit Court of Appeals held that the report of the Commissioner and the final decree entered thereon failed to comply with the provisions of the interlocutory decree, accepted as aforesaid by the petitioners, and reversed the said final decree accordingly. Its opinion concluded as follows (Record, p. 445): "The interlocutory decree provided that the libellants recover *only* such damage 'as was caused by closing the hatches and ventilators of the vessel at night during good weather'. The burden of proof resting on the libellants under the law was thus clearly stated in the decree and was not discharged by showing damage which apparently came within the bill of lading exceptions though it might in part have been attributable to the negligence of the ship. Having left the cause of the decay in doubt, the libellants left the ship excused. *The Isla de Panay,* 292 Fed. 723; *The Bencleuch,* 10 F. (2d) 49." (Italics supplied.)

POINT I.

The Petitioners Have no Standing to Complain Here for the First Time of the Rule of Damages Prescribed in the Interlocutory Decree and Accepted by the Circuit Court of Appeals.

Neither the petition nor the brief filed in support of the same attacks the ruling of the Circuit Court of Appeals that the interlocutory decree unambiguously imposed upon the petitioners the burden of proof here complained of. The soundness of that ruling neither is, nor, we believe, could successfully be, questioned.

In the last analysis, therefore, what the petitioners are here seeking to do is to complain of the Circuit Court of Appeals for enforcing against them the rule of damages prescribed by the interlocutory decree. But on the appeal to the Circuit Court of Appeals they assigned no error to the said interlocutory decree nor otherwise complained of the same in any respect. Under such circumstances, they are in no position to complain here that the Court of Appeals did not relieve them from the rule of damages imposed upon them by such interlocutory decree.

Rule 37, subdivision 3, of the Rules of the United States Circuit Court of Appeals for the Second Circuit adopted in December, 1928, requires an appellee in admiralty that desires relief different from that accorded him below to file and serve within ten days after the service of the appellant's notice of appeal an assignment of errors specifying those rulings of the District Court to be made the subject of his attack. It reads: "If the appellee desires other or further relief than that granted by the decree he must within ten days after the appellant has served his Notice of Appeal file with the Clerk of the District Court and serve on the proctor for the appellant an assignment of errors."

This rule was presumably adopted pursuant to the Act of March 3, 1891, Chapter 517, Sec. 2 (26 Stat. 826) as amended by the Act of March 3, 1911, Chapter 231, Section 122 (36 Stat. 1132) and constituting Section 122 of the Judicial Code (28 U. S. C. A., Sec. 219), which provides as follows: "Each Circuit Court of Appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law."

Whereas prior to the adoption of this rule of procedure the appellee on an appeal in admiralty in the Second Circuit could attack proceedings below without any such assignment of errors (*Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. 960; *The Townsend*, 29 Fed. (2d) 491), the situation obtaining when the appellant's notice of appeal was allowed herein, viz., July 17, 1933 (Record, p. 434, f. 1302), was quite different (*The Jefferson Myers*, 45 F. (2d) 162; *In re Lee Transit Corp.*, 37 F. (2d) 67; *Federal Ins. Co.* v. *United States*, 60 F. (2d) 46; *The Asfalto*, 51 F. (2d) 982).

POINT II.

Even if the Petitioners were entitled to complain here of the enforcement against them by the Circuit Court of Appeals of the rule of damages prescribed in the interlocutory decree of the District Court, their contention would lack merit.

In paragraph 3 of the bill of lading the parties agreed that there should be no liability on the part of the carrier for decay of the onions (Record, p. 296). The damage affecting the onions at destination was, as found by both

of the courts below, decay. Accordingly the petitioners were entitled to no recovery unless they were able to, and did, show "that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods" [*Clark* v. *Barnwell,* 12 How. 272, 280, 282; *Transportation Co.* v. *Downer,* 11 Wall. 129, 133; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427, 432; *The Isla de Penay,* 292 Fed. 723, 728-729, (C. C. A. 2nd Cir.), affirmed in 267 U. S. 260); *United States* v. *M. Levy's Sons,* 288 Fed. 544, 545 (C. C. A. 5th Cir.); *Wertheimer* v. *Penn. R. Co.,* 1 Fed. 232, 234 (C. C. S. D. N. Y.); *Wolff* v. *The Vaderland,* 18 Fed. 733, 739 (D. C. S. D. N. Y.)].

The petitioners' contention, as we understand it, is that the court should not have imposed such a burden upon them in this particular case for two reasons, viz: (1) That the bill of lading agreement excepting decay damage was contrary to public policy and absolutely void; and (2) that, even if it was valid, still it was subject to being defeated by their showing merely that the carrier's negligence did or may have contributed to some undefined extent to produce some unknown and unknowable portion thereof.

The first of these two arguments is answered by *Cau* v. *Texas & Pacific Ry. Co., supra,* where, at page 432, the same argument was considered and rejected on the authority of *Clark* v. *Barnwell, supra.*

The second argument is founded upon a failure to distinguish between cases involving exceptions of *kinds* of damage such as decay and breakage on the one hand and cases dealing with exceptions of *causes* of damage such as perils of the seas on the other hand.

In cases of the second of these two classes, where the exception relied upon exempts damage *caused* by a given *peril,* the burden, of course, rests upon the ocean carrier in order to benefit from the exception to show that all or some particular portion of the damage was in fact *caused* by the *peril.*

And, even if, in such cases, the carrier is able to show that all or some definite portion of the damage was caused by the given peril, the libellant may still defeat the exception by showing that the damage-producing peril was itself caused or contributed to by the carrier's negligence. In that event, the benefit of the exception is naturally at once lost. For in such case the carrier's negligence is, since it caused or contributed to the damage-producing peril itself, the cause of *the* damage complained of. Typical cases of that sort in which the libellant succeeded in showing that the damage-producing peril was itself contributed to by the carrier's negligence, with the result that the exception *eo instanti* became a dead letter, are *The Edwin I. Morrison,* 153 U. S. 199, 211, and *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 438, both cited and relied upon by the petitioners.

On the other hand, in cases of the first class, that is, cases relating to exceptions of a given *kind* of damage, once the damage is shown to have been of that particular *kind,* the carrier is under no burden of showing that it resulted from a particular *cause.* Irrespective of cause he stands excused. Of course, *if* the libellant can nevertheless show that such damage or some distinguishable portion thereof was due to a cause to which the carrier's negligence contributed, it can to that extent, but only to that extent, defeat the exception. Typical cases of this class are *The Bencleuch,* 10 F. (2d) 49, 50, 51-52, and *Moes, Moliere & Tromp* v. *Leith & Amsterdam Shipping Co.,* 5 Sess. Cas. (Third Series) 988, 991, 992, 996-998.

In the case at bar, of course, the damage was of a given *kind.* And when that fact appeared the respondent stood excused unless and until the petitioners could show that all or some definite portion of that damage was due to a cause to which the carrier's negligence had contributed. Until the petitioners could do that they were unable to bear their burden of showing to what extent

the respondent could have avoided the loss through the exercise of due skill and diligence in the care of the onions.

Both of the courts below agreed in the finding that the libellants not only had made no attempt to, but could not, establish what portion, if any, of the decay of the onions was due to a cause to which the respondent's negligence had contributed. Hence, it necessarily followed that the petitioners had failed to relieve themselves from the effect of the bill of lading exception.

POINT III.

The petition should be denied.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for Respondent
Lloyd Mediterraneo.

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Supreme Court of the United States.

OCTOBER TERM, 1934—No. 134.

HARRY SCHNELL and SAMUEL SCHNELL, copartners doing business as H. SCHNELL & Co.,

Petitioners,

AGAINST

The STEAMSHIP VALLESCURA, her engines, &c., LLOYD MEDITERRANEO,

Respondent.

BRIEF FOR RESPONDENT.

Statement of the Case.

The libel herein was filed on December 15, 1925, (R. 1) and sought a recovery *in rem* from the Italian steamer Vallescura of alleged damage to a cargo of onions shipped on that steamer from Spain to New York by Bautista Monton & Co. and consisting of four lots covered by four separate bills of lading as follows: 16,043 crates shipped at Gandia on or about November 5th, 1925, (R. 3), 766 half cases shipped at Gandia on or about November 5th, 1925, (R. 4), 8,957 crates shipped at Denia on or about November 10th, 1925, (*id.*) and 433 crates and 66 half cases shipped at Denia on or about November 10th, 1925 (*id.*). The first and third of the lots above enumerated were alleged to have been shipped to the order of the Chatham-Phenix National Bank & Trust Company, the second and

fourth to the order of the shippers themselves (*id.*) and all to have become the property of the libellants prior to the steamer's arrival at New York (R. 5).

The claim forming the basis of the libel was that on the arrival of the steamer in New York on December 8, 1925, the onions were "not in like good order and condition as when shipped, but short, slack and seriously injured and damaged by and through the negligence of the s/s 'Vallescura', in respect to the loading, stowing, custody, care and proper delivery of the said merchandise, and by and through the unseaworthiness of the said s/s 'Vallescura'" (*id.*).

Lloyd Mediterraneo appeared as the claimant of the Vallescura and filed an answer to the libel (R. 6) on April 16th, 1926, (R. 1). In said answer it denied, among other things, the charge of "negligence" "in respect to the loading, stowing, custody, care and proper delivery of the said merchandise" and the charge of "unseaworthiness" thus levelled against the steamer (R. 7).

The claimant further alleged that it had, for the purposes of the voyage in question, exercised due diligence to furnish, and in fact had furnished, a "seaworthy and properly manned, equipped and supplied" steamer, in keeping with the Act of Congress of February 13, 1893, commonly known as the Harter Act, and that if any of the alleged cargo damage was due to anything happening aboard the steamer it was due to causes from liability for which the said Harter Act relieved the vessel, her owner, officers and crew (R. 8).

As further matter of defense, the claimant alleged that in the steamer's bills of lading it was agreed by and between the carrier and the shippers: That, though the various crates and half cases of onions were externally "in apparent good order and condition", the carrier was without knowledge as to the "contents" and the "condition" of the contents (R. 9); that in no event was the carrier to be liable for, among other things, "decay" of such

"contents" (R. 11); and that, to the extent that the cargo showed damage on delivery at New York, it was damage of a kind that the shippers thus agreed, and were content, to bear (*id.*).

The claimant also, pursuant to Rule XXXI of the Admiralty Rules promulgated by this Court, in connection with and as a part of its answer, propounded various interrogatories to be answered by the libellants upon oath (R. 14). One of these, numbered 8, called upon the libellants to inform the claimant as to the precise nature of the damage, that, according to their claim, affected the cargo on arrival at New York; that is, whether it was breakage, or damage due to contact with salt water or with fresh water, or damage due to heat or to sweating, or whether it was decay damage, or any one of various other types of damage embraceable within the general allegations of the libel (R. 15). These interrogatories, however, the libellants did not answer; although on their taking for their use upon the trial the deposition of Bautista Monton, the shipper, on September 14, 1926, (R. 164), their counsel's attention was called to the fact that such interrogatories had not been answered (*id.*) and the request was then made, particularly with respect to the said 8th interrogatory, that they then, at least in substance, be answered by libellants' counsel, to enable claimant's counsel to conduct a proper cross-examination of the witness (R. 168). The request was declined, however, because, as libellants' counsel stated, he had looked through his papers and found nothing in them that enabled him to answer that interrogatory (*id*).

On the trial, however, it developed that the sole damage complained of by the libellants was "decay". Among other evidence they relied upon to establish the fact of the decay was the certificate of an inspector of the "Federal Horticultural Board" of the United States Department of Agriculture, showing that the condition of the onions when examined by him on December 15, 1925,

was "twenty to twenty-five per cent. decay and sprouting" (R. 72). This certificate further showed under the heading of "Remarks" a notation that it was "A poor cargo" (*id.*).

The libellants also undertook to prove the decayed state of a considerable portion of the onions by Morris Levy, an inspector of customs at the port of New York, who had examined the cargo to determine whether and to what extent there should be a refund of customs duty because of the alleged decay (R. 21, 23). He testified, in part, to the effect that in making his examination he would pick up onions "at random" and that the most of those picked up and examined by him were "slimy beneath the skin" (R. 24). Some of the onions he cut open and in the *most* of those thus examined he found that "they were *pretty* sound in the heart" (R. 25, italics supplied). From this fact he inferred that in the case of the most of the onions thus cut open the decay had started on the outside (*id.*). But, when asked whether he could, as a result of his examination, state what was "the approximate cause" of the decay that he had thus found, he said that he "could only hazard a guess" (*id.*).

Again, he said, "*some* may have had a little bud, but the majority of them were under the skin" (*id.*, italics supplied). As to this "bud" decay he explained his meaning later on by saying that "*some* showed, of course, *the usual decay from the stem of the bud,* most of them were slimy • • •" (R. 30, italics supplied). This witness, in the course of performing his duties as inspector of customs, had during the seven and a half years spent by him in such service, examined on the average, he testified, from "about 50 to 70 cargoes per year" (R. 21-22) and always found some decay in every cargo so examined. "Q. In all the 50 or 75 cargoes a year you do find some decay? A. Some decay" (R. 26).

The records of the Department of Health of the City of New York were also put in evidence (R. 20). They

showed that on the arrival of the steamer this onion cargo had been "ordered overhauled" (R. 24); "cargo discharged Dec. 12, 1925" and "overhaul completed on 22/25"; and that as a "result of overhauling" 3,090 crates and 17½ cases were condemned (R. 20). That is, out of the total number shipped, viz., 25,433 crates and 832 half cases, the total number condemned by the Board of Health, after the onions had been overhauled, was 3,090 crates and 17½ cases; or in percentages approximately 12 per cent. of the onions shipped in crates and 2 per cent. of those in cases.

Some onions, other testimony showed, bore sprouts varying in size up to nine inches in length (R. 117-118); and these merely "sprouting" onions were included, over the objections of the ship's surveyors, in the onions segregated as bad in the general overhauling (R. 118-119).

Harry Schnell, one of the libellants, appeared on behalf of those parties and gave testimony. Among other things he testified that in order to determine whether an onion was diseased or not it was necessary to cut it open; that the test of "merely looking at the onion and handling it" would be insufficient for that purpose unless "it was very badly diseased". He testified: "Q. From your experience of fifteen years, could you tell whether the onion was a diseased onion or a healthy onion? A. Yes, *by cutting it open.* Q. Could you tell it by looking at the onion and handling it, without opening the onion? A. I would, if it is *very* badly diseased I would." (R. 53, italics supplied). And, the same witness testified, disease attacks the onion "in most cases" in that part "where the stump of the onion is" (*id.*).

The testimony of this witness as to the impossibility of detecting the diseased condition of an onion without cutting it open was in all respects confirmed by the sole and uncontradicted expert testimony in the case, viz., that of Leroy A. Matthews, who was an assistant instructor in the Department of Bacteriology and Sanitation in the

Pease Laboratories in New York City and who testified on behalf of the claimant (R. 127). He testified that what the onion trade knew "as a cooked or baked onion", a term that some of the libellants' witnesses had used in describing the decayed onions (R. 25), was "an onion from which the outer scales have a watery, transparent appearance, instead of the usual opaque, white appearance of a healthy, sound onion; the watery transparent appearance is caused by the breaking down of the sound tissue of the onion, due to the effects of bacteria or mould which have gotten into the tissues of the onion, have developed and have subsequently caused the breakdown of the tissue, causing it to be slimy, soft and watery. Frequently in the case of onions you have a growth of mould on the surface. That is the cause of the so-called cooked onion; the word 'cooking' or 'baked' is very loosely used, as I consider it from a scientific standpoint, because it has not been cooked or baked. It has not been subjected to any bacteria which will cause that kind of a deterioration, it is simply the result of bacteria which have been in the onions, presumably at the time they were loaded, the bacteria being present in such small numbers that the destruction had not progressed to an extent which was noticeable to the sense of feel or to the eye" (R. 129).

The same expert testimony showed that it is impossible to have an infection of an onion other than by bacteria entering the onion through the stem at the point where it is cut off when harvested or through bruises then or thereafter received, or by moulds forming on its outside scales and gradually penetrating the same (R. 132, 141). The decay of an onion, this testimony further showed, can occur only from such bacterial or mould action (R. 142) and "it would be impossible for a person to tell whether the onion had bacteria or mould spohrs in it at the time of shipment unless the disease had progressed so that it was obvious" (R. 141-142).

Tests conducted by the witness with a number of Spanish onions, all apparently sound to start with, showed that, when kept in dry air at a temperature of 98° Fahrenheit, they would keep for widely differing periods of time; that some would spoil in 9 days and others be apparently well preserved at the end of 31 days (R. 136-137); that moist air would hasten the deterioration, so as to produce decay of some of the apparently sound onions in seven days, while others, even in such an atmosphere, would keep for a considerable period of time (R. 138); and that the reason for this wide difference in rate of deterioration among the onions of the same lot was, in each case, the relative extent to which they had originally been infected by the bacteria or mould (R. 138).

To show the condition of their onions at time of shipment the libellants offered testimony of the shipper of the onions Bautista Monton, taken by deposition as aforesaid (R. 171). He purchased the onions from farmers (R. 187), who had harvested them between June and September and kept them stored on their farms until sold to the shipper at a time about ten days prior to shipment aboard the Vallescura (R. 186, 194). The shipper conceded that upon the kind of treatment accorded the onions after they had been harvested would depend whether they would "last well or would rot early". "Q. But whether the onions would last well or would rot early would depend largely upon the kind of treatment that they had received after being harvested? A. After being harvested, of course. Any time after being harvested" (R. 187).

And the shipper likewise admitted that he knew nothing whatever as to the treatment that these particular onions had in fact received between the time they were harvested and the time he received them, some ten or twelve days prior to shipment. "Q. Therefore, it would be impossible for you to state where these onions had been stored or how they had been stored between the

time they were harvested and the time they were brought to your warehouse? A. I know nothing about that" (R. 196).

And, although the shipper testified that when he shipped the onions they "looked" sound (R. 180), he also admitted that he did not actually "handle" them (R. 200). The only method that he knew for distinguishing a good onion from a bad onion was "By the look of it and also by the smell (R. 178). His "opinion", thus formed merely from looking at them and observing no bad odor, was that "they were all good enough" for "shipment to the United States" (*id.*); though conceding that if the steamer's hatches had to be kept down for four or five days, the onions would spoil (R. 211).

The only other witness offered by the libellants to show the condition of the onions on shipment was one Joseph M. Gil (R. 62), who claimed, among other things to have seen the onions delivered by lighters from the dock to the steamer and loaded on the Vallescura at Gandia (R. 65, 69); though it elsewhere appeared that he had left Gandia on the 4th of November and was in Barcelona on the 5th on his way to Cherbourg, France, whence he sailed on the 7th (R. 71), and the steamer did not arrive at Gandia until 6:30 in the evening of the 4th and did not commence loading until the 5th (R. 242). And the loading of the Denia onions was not commenced until the afternoon of November 7th (R. 242). In any event, he claimed to have seen no more than a part of the cargo (R. 62), knew nothing about the effect of bacteria in onions (R. 69) and was unable to say whether the onions he had seen in Denia and Gandia were or were not diseased onions (R. 67). "Q. Mr. Gil, from your experience, and from being interested in the Spanish onion business for the last eighteen or twenty years, can you tell whether the onions which you saw in Denia and Granada" (Gandia) "in Spain were diseased onions? A. No." (*id.*).

On behalf of the claimant testimony was offered to show the good character of the stowage (R. 83-86, 111-

117, 217, 219). The steamer's testimony also showed that the steamer, on sailing, was in good first-class condition (R. 215-216, 239), having at least two ventilators for each hold, one forward and one aft (R. 218, 113) and was well manned, equipped and supplied (R. 215, 224, 225, 226, 239-240).

The master of the steamer also testified on direct that the ventilators were open on the vessel's leaving Gandia and Denia (R. 218); that they were thereafter closed "when the weather was bad" (*id.*); that they "were closed so as to avoid the water entering the holds when the weather was bad" (*id.*); also that when "the weather permitted the hatches were left open" (*id.*); that the hatches were open on the vessel's leaving Gandia but on her leaving Denia "closed because of the bad weather" (R. 219); that whenever the hatches were closed thereafter it was "because of bad weather" (*id.*); that both ventilators and hatches "were left open during fair weather, but were closed during bad weather" (R. 220); and that "they were always open during fair weather" (*id.*).

This examination of the master, however, was conducted on written interrogatories before the United States Consular authorities at Genoa, Italy (R. 215), and, in answer to one of the cross-interrogatories, he is represented as having said that in good weather he "opened the *ventilators* in the day time and closed them at night, and in bad weather the ventilators were kept closed at all times" (R. 227 italics supplied); though, in answer to the third preceding cross-interrogatory, he had just testified regarding the *hatches* that "when the weather was suitable they were opened, when the weather was unsuitable they were closed" (R. 226).

The master testified that he had carried two cargoes of onions previously to Montreal and that the ventilating system of the Vallescura was a good and proper one for the necessities of such a cargo (R. 219).

The Vallescura's master further testified that the voyage from Spain to New York was unusual in respect to the time consumed therein (R. 220), the ordinary time for such trans-Atlantic voyage for his steamer, which had a speed of 9 knots (R. 222), being 14 to 15 days (R. 220), whereas on the voyage here involved, from the time the vessel started from Gibraltar on November 14 to the time she arrived in New York on December 5, a period of approximately 21 days had elapsed (R. 243, 245). The onions, of course, were in the steamer for a substantially longer time, the Gandia onions, approximately two-thirds of the whole shipment, for more than thirty-two days, they having been loaded on November 5 (R. 242) and discharged on December 7 and 8 (R. 36, 78, 81), and the balance of the onions for between twenty-six and thirty-one days, they having been loaded at Denia on November 7 and 11 (R. 242-243) and discharged on December 7 and 8 (R. 36, 78, 81).

In respect to the weather, it was shown to have been bad and to have prevented loading at Denia for almost the whole of the seven days the vessel lay there (R. 242-243), thus necessarily curtailing the ventilation of the great bulk of the onion cargo, and to have continued with heavy showers as the vessel started on her voyage (R. 244). On the 22nd, 23rd and 24th days of November the vessel experienced heavy rolling, which, on the 26th, was accompanied with heavy showers, heavy sea and strong pitching (*id.*). On the 27th the wind attained a violent force causing high seas to break on the deck violently and apparently causing a loss of deck cargo. As soon as the weather permitted, the bilges were sounded and an excessive quantity of water found therein. It was concluded that owing to the breaking of the heavy seas on deck water might have entered the holds, damaging the cargo. The wind and sea continued heavy, causing violent rolling and strong vibrations to the hull and steering gear (*id.*). And it did not improve until a time approaching evening on the next day, the 28th (*id.*).

On November 30 showers were again experienced with an agitated sea (*id.*). On the following day there was strong rolling and pitching accompanied by strong winds and the breaking of very heavy seas on deck (*id.*). This condition of the weather and seas continued on the 2nd, when also heavy showers fell and it was observed that the engines were being excessively strained by the rolling and pitching to which the steamer was subjected (*id.*). The same weather and seas continued on the 3rd of December, in the course of which it was discovered on the night of December 2 that extensive machinery damage had been sustained, including a serious fracture of the circulating pump, which seriously interfered with the regular working of the engines, a serious heating of the shoe of the low pressure cylinder, a serious heating of the bearings in the tunnel of the transmission shaft, severe damage to the Weir pump and its connections, a breaking in of the flooring of the boiler room, the collapse of the boiler insulation and other damage to the generator motor and auxiliaries (R. 245). The weather was constantly bad from Bermuda to New York (R. 220) and was without doubt "exceptional" in its severity and duration (R. 223).

The District Court made no express findings of fact, the decision having been handed down prior to the adoption of Rule XLVI ½ of the Admiralty Rules promulgated by this Court. From the District Judge's opinion (R. 247), however, it can be gathered that he found the steamship to have been seaworthy and properly manned, equipped and supplied, and the cargo well stowed within her. It appears therefrom that he found that so far as external appearances went the cargo was on shipment, as recited in the bills of lading, in apparent good order and condition and that on outturn it was in part affected by decay damage. It also appears from his opinion that at least during some of the nighttime the hatches and ventilators of the steamer were closed dur-

ing weather during which they might have been safely left open. He made no finding, however, as to the number of nights, if any, on which it would have been safe to permit the ventilators and hatches to remain open; nor how long on such nights they might have been safely allowed so to remain. But he did find that the time during which they were thus unnecessarily closed, *plus* the time during which they were necessarily closed at night, was a sufficient time for the causing of substantial damage (R. 248). And he further found that any unnecessary closing of them at nighttime was negligence and that for any damage resulting from such unnecessary closing the Vallescura was liable (*id.*).

The District Judge made no finding as to whether the cargo was *in fact sound* at time of shipment; nor as to the *cause* of the damage. Nor did he find that *any* of the damage had in fact been caused by unnecessary suspension of ventilation at night. His ruling simply was, as we read it, that *for* any damage so caused the libellants were entitled to recover.

Accordingly, the interlocutory decree that he thereafter entered (R. 249), instead of directing, as such decrees generally do, that the libellants recover their damages happening by reason of the matters and things alleged in the libel, specifically restricted their recovery to such damage "as was caused by closing the hatches and ventilators at night during good weather" and expressly directed that they should not recover "any damages * * * except such damage as was caused by closing the hatches and ventilators of the vessel at night during good weather" (*id.*). And the case was by said decree referred to William Parkin, Esq., as a Special Commissioner to ascertain whether any and what damage had been sustained by the libellants by reason of that particular cause and to compute the amount thereof (*id.*).

The libellants neither appealed from said decree nor made any move toward establishing or collecting any damages therein for two years and a half thereafter;

that is, until October 21, 1931, when the case was noticed for a hearing before the Special Commissioner (R. 250, 317). Before such commissioner they submitted at a single hearing all of their proofs, which were designed to show not whether any or how much damage had been sustained by their onion cargo as a result of any unnecessary closing of the steamer's hatches and ventilators at night, but simply the total loss resulting from the decay of their onions, regardless of the source or efficient cause of such damage (R. 253-289).

The Commissioner was thereupon, viz., at the close of the said hearing, requested by claimant's counsel to make a ruling upon the point whether the libellants had the burden of proving whether and to what extent their goods had in fact been damaged by the unnecessary closing of the Vellescura's hatches and ventilators at night, or whether the burden was upon the claimant to prove whether and to what extent the libellants damages were due to other causes; the ground of the request being the fact that claimant's witnesses were available, if at all, only in remote foreign ports and that if the burden really lay upon the libellants it would be to impose an unnecessary hardship upon the claimant to require that party to incur the very substantial expenditure of time, effort and money, that would necessarily be incurred in seeking out the witnesses and procuring their depositions (R. 290-291). This request, however, was declined by the Commissioner, who announced that no ruling on the point could properly be made until all of the proofs were in for both parties, and that it was incumbent upon them at their peril to offer in advance of that time all such proofs as might thereafter, in the light of such ruling when made, prove to have been necessary or advisable (R. 291). Claimant's counsel thereupon, without prejudice to that party's position that the burden lay with the libellants and not with the claimant, procured an adjournment to enable him to procure the depositions of the steamer's officers (*id.*).

These further depositions were subsequently taken on written interrogatories as follows: That of Giuseppe Barone, former chief officer of the Vallescura, who had not previously testified in the case, was taken at Genoa, Italy, on September 22, 1932 (R. 307); that of Salvatore Irrera, former second officer of the Vallescura, who had not previously testified in the action, was taken at Messina, Italy, on February 1, 1933; and that of Bartolomeo Dulbecco, former master of the Vallescura, a deposition from whom taken at Genoa, Italy, on June 18, 1928, had been read in evidence on the trial of the merits (R. 215), was taken at Trieste, Italy, on February 4, 1933. The purpose of these depositions was to show that any damage resulting from any unnecessary closing of the steamer's hatches and ventilators approached nullity for the reason that they were never unnecessarily closed. And such was in short their effect.

Barone, the chief officer, testified that when the hatches were closed at night they were always, unless seas were sweeping the deck, so closed that the hatch covers formed a "gabled roof" with a tarpaulin stretched over the top "so that air could circulate without allowing humidity (dew) to penetrate" (R. 309) and that the ventilators were never closed even in bad weather (*id.*). Irrera, the second officer, gave testimony to substantially the same effect, adding that the ventilators were of the mushroom type (R. 304), which, of course, cannot be closed short of being unshipped and plugged. And Dulbecco, the Master, testified to substantially the same effect (R. 299-301), stating that "it was impossible to close" the ventilators (R. 299) and that it was only when "the water came over the deck" that the hatches were "completely closed" (R. 301).

After the foregoing depositions had been put in evidence (R. 295-296), the hearings before the Commissioner were closed (R. 298), without further proofs' being offered by either party.

The Commissioner in his ensuing report (R. 312) ruled that the depositions of the steamer's officers, taken as aforesaid during the pendency of the reference, were not to be considered in determining the extent to which there had been any unnecessary closing of hatches and ventilators at night. He based this ruling upon the express ground that the District Court had made a "finding that the hatches and ventilators were always closed at night" (R. 313). With these proofs eliminated, the Commissioner ruled further that it was "impossible to say how much of the decay was due to lack of ventilation during good weather" (R. 313). He held, however, that the burden under the law maritime was upon the claimant to show to what extent the decay damage was due to other causes; that the unusual and specific provisions of the interlocutory decree were ineffective to shift that burden (R. 312-313); and that, since the claimant had failed to bear such burden, it should be made liable for all of the decay damage, regardless of how the same might have been caused (R. 315).

Exceptions were duly filed to the Commissioner's report challenging all of the foregoing rulings (R. 317). These were subsequently overruled by the District Court (R. 319), whereupon a final decree was entered for the libellants on May 17, 1933, for all of their decay damage in the sum of $15,166.71, with interest from and after that date until paid (R. 320).

An appeal from said final decree was thereafter duly allowed (R. 322) and noticed (R. 321). Error was assigned to the rulings of the Commissioner that had been excepted to as aforesaid, to the ruling of the District Court in overruling the said exceptions and to various rulings of the District Court on its consideration of the merits resulting in the entry of the interlocutory decree, viz., its finding that the hatches and ventilators had ever been unnecessarily closed at night (R. 322), its finding that such action constituted negligence (R. 323), its ruling that such action, even if negligent, was a fault "in

the care and custody of the cargo" (R. 322) and its entry of the interlocutory as well as the final decree in favor of the libellants (R. 324).

The Circuit Court of Appeals found with the District Court that the steamer's hatches and ventilators were unnecessarily "closed some nights in good weather" (R. 328); and that this was negligence in the care and custody of the cargo and not in the management of the ship (*id.*). It found, further, that the necessary closing of the hatches and ventilators during the undisputed rough weather and the delay of the voyage caused thereby were in themselves sufficient to account for "considerable decay" (*id.*); and that the proofs had failed to establish that, by reason of unnecessary closing of hatches and ventilators, any further decay was produced beyond what would otherwise have happened (R. 330). The Court held, contrary to the ruling of the District Court, that since all of the damage was decay damage and, therefore, a kind of damage for which, under the bill of lading exceptions, the claimant was *prima facie* not liable, the burden was upon the libellants, before they could impose liability for such damage upon the other party, to establish that by the exercise of due skill and care the claimant could have avoided the damage; and that they did not bear that burden by merely showing negligence and the possibility that some portion of the damage *might have been* "attributable" thereto (R. 329-330). "Having left the cause of the decay in doubt, the libellants left the ship excused" (R. 330). The Circuit Court of Appeals reversed the decree accordingly.

It is the position of the respondent that the decree of the Circuit Court of Appeals is sustainable on each of the following two grounds: (1) On the ground on which the decision was based in that court; and (2) on a ground rejected by that court, viz., that the fault of the respondent relied upon by the petitioners was a fault in the management of the steamer, not in the care and custody of the cargo.

POINT I.

The onion damage having been decay, the risks of which were under the bill of lading contracts assumed by the shipper, the petitioners were entitled to recover therefor from the respondent only on showing that the carrier could by the exercise of due skill and care have averted the decay.

Apart from special agreement *or statutory limitation* reducing his common law liability, a common carrier is *prima facie* liable for all loss and damage affecting cargo in his custody save only such as results from the Act of God and public enemies. *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 437. Damage due to inherent vice, defect or disease of the thing carried independent of the act of man is included within damage resulting from Act of God, from liability for which the carrier is exempted at common law. *Warden* v. *Greer,* 6 Watts (Pa.), 424; *Nugent* v. *Smith,* 1 C. P. D. 19, 423, 441; *Clark* v. *Barnwell,* 12 How. 272, 282.

The basis of this strict rule of the common law seems to have been presumed negligence on the part of the carrier, which presumption could be overcome only by his showing that the loss was in fact due to the one or the other of those excepted causes. *Forward* v. *Pittard,* (1785), 1 T. R. 27; *Nelson* v. *Woodruff,* 1 Black, 156, 160. And the basis in turn for such presumed negligence on the part of the carrier appears in large part to have been the consideration that the carrier having the goods in its sole custody and possession had the best, if not the only, means of explaining the loss and damage. *Riley* v. *Horne,*

(1828), 5 Bing. 217, per Best, *C. J.; Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, 492.

Such strict common law liability, however, may be reduced by special agreement between the carrier and the shipper, provided only that the agreement is reasonable and not violative of public policy. *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 343, 381-382. The special contract may not relieve the carrier from the consequences of his or his servants' negligence. *Railroad Company* v. *Lockwood,* 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Ins. Co., supra.* That would violate public policy. But special contracts relieving the carrier from loss or liability for damage that generally happens, or as often as not may happen, without negligence on his part or on the part of any other human actor are deemed reasonable and liberally enforced. *York Company* v. *Central Railroad,* 3 Wall. 107; *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427. And particularly is that true of damage developing from within the goods themselves, such as decay. *Clark* v. *Barnwell, supra,* at p. 282; *Railroad Company* v. *Lockwood, supra,* at p. 380; *The Florinda,* 31 F. (2d) 262, 264, (C. C. A. 2d Cir.); *The Toyohashi Maru,* 13 F. (2d) 871, (D. C. S. D. N. Y., Learned Hand, *J.*).

In such case there is no room for the presumption of the common law that the particular kind of damage complained of happened by reason of the negligence of the carrier or that because he or his servants had the goods in their exclusive possession at the time the decay set in they were in any better position than the shipper himself to explain the cause of such decay. It was particularly appropriate, therefore, that in the carriage on long ocean voyages of goods particularly susceptible to decay that the parties should by agreement substitute their own more rational presumption for that of the common law; should agree that in case of decay damage

the same should be presumed to have resulted from causes *other* than the carrier's negligence instead of from that one particular cause of all others. It is not violative of public policy since it does not expressly purport to relieve the carrier from his own or his servants' negligence and since, as was said in *Bank of Kentucky* v. *Adams Ex. Co.*, 93 U. S. 174, 181:

> "It is not to be presumed the parties intended to make a contract which the law does not allow."

Such is the decay exemption clause in the case at bar, viz:

> "3. * * * Contents * * * Condition * * * unknown and not accountable for * * * decay * * * (R. 11, 228A)."

Not only was it reasonable that the parties should have entered into such an agreement, but, indeed, in view of the Spanish onions' high susceptibility to decay, in view of the fact that such decay can only develop from infection by, and rapid multiplication of, bacteria and spohrs operating in mysterious and uncertain fashion upon the inner tissues of the onion and in view of the fact that there is no way of determining whether the onion is so infected or diseased by examining it from the outside until the decay is well advanced, all as shown by the uncontradicted proofs herein (*supra,* 4-8), it becomes at once obvious that for the carrier to have attempted their transportation across the Atlantic under any other sort of an arrangement would have been most unreasonable. And certainly it was at the very least fitting and proper that the carrier's common law insurer risk of decay should be assumed by the shipper and by him placed, if he felt so advised, with an insurance company especially organized and equipped to bear such risks.

The effect of the agreement was, as pointed out *supra*, not to relieve the carrier from any negligence on his or his servants' part; but, instead, in recognition of the patent inapplicability of the common law presumption to the facts in hand, to substitute the more reasonable presumption, viz., that any and all decay damage suffered by the onions in course of transit happened by reason of causes other than the negligence of the carrier or his servants. And so have this and kindred clauses regularly been construed by the great majority of the courts, both state and federal. Once the damage has been shown to fall *prima facie* within the exception, the burden is upon the goods' owner to show, not merely negligence on the part of the carrier, even though concurring negligence, but in addition that such concurring negligence was the *efficient* cause of the loss; *that the loss could have been avoided or prevented by the exercise of due skill and care on the part of the carrier.*

Such was the ruling in the leading case of *Clark* v. *Barnwell*, 12 How. (U. S.) 272, where it was said at page 280:

> "After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show, *that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods;* for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet *if it might have been avoided by skill and diligence at the time,* the carrier is liable. But in this

stage and posture of the case, *the burden is upon the plaintiff to establish the negligence,* as the affirmative lies upon him." (Italics supplied.)

And again at page 282 it was said:

"Now the evidence showing very satisfactorily that the damage to the goods was occasioned by the effect of the humidity and dampness, which in the absence of any defect in the ship or navigation of the same, or in the stowage, is one of the dangers or accidents of the seas for which the carrier is not liable, the *burden* lay upon the *libellants* to show, *that it might notwithstanding have been prevented by reasonable skill and diligence of those employed in the conveyance of the goods.* For, it has been held, if the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. 12 East, 381; 4 Campb. 119; 6 Taunt. 65; Abbott on Ship. 428, (Shee's Ed.). *But if it can be shown that it might have been avoided by the use of proper precautionary measures,* and that the usual and customary methods for this purpose have been neglected, they may still be held liable. And the same rule applies in the case of damage on account of the humidity and dampness of the ship, which is, more or less, incident to all vessels engaged in trade and navigation, especially upon the high seas. Notwithstanding, therefore, the proof was clear, that the damage was occasioned by the effect of the humidity and dampness of the vessel, which is one of the dangers of navigation, it was competent for the libellants to show, that the respondents *might have prevented it by proper skill and diligence* in the discharge of their duties; but no such evidence is found in the record." (Italics supplied).

It wasn't enough, then, for the petitioners in the case at bar to show that the carrier was negligent, either concurrently, subsequently or antecedently, and that such negligence would alone have been *sufficient* to produce the damage. They were required to do more to rid themselves of the effect of the exception of decay; they were required to show that the carrier by diligence and attention *might have avoided and prevented the decay.* It was incumbent upon them to show that *all other* causes were *insufficient.* The burden upon the petitioners was no other or different from that which would have been upon the carrier in seeking to escape liability for the damage had there been no exception of decay. Such a showing they did not even attempt to make.

To the same effect is *Transportation Co.* v. *Downer,* 11 Wall. 129, where Mr. Justice Field, delivering the opinion for this Court said at page 133:

> "On the trial the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for the transportation to Chicago, and by proving the arrival of the coffee at the latter place in the propeller Brooklyn in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation. These terms, 'dangers of lake navigation', include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them. The plaintiff then introduced testimony to show that this danger, and the consequent loss, *might have been avoided* by the exercise of proper care and skill on the part of the defendant. *If the danger might have been thus avoided,* it is plain that the loss should be attributed to the negligence and inattention of the Company, and it should be held liable, notwithstanding the exception in the bill of lading. The *burden* of establishing *such* negligence and inattention rested with the *plaintiff,* but

> the court refused an instruction to the jury to that effect, prayed by the defendant, and instructed them that it was the duty of the *defendant* to *show* that *it* had *not* been guilty of *negligence.* In this respect the Court erred. In *Clark* v. *Barnwell, the precise point was involved,* and the decision of the Court in that case is *decisive* of the question in this. *And that decision rests on principle".* (Italics supplied).

Similarly in the case at bar the petitioners were allowed to recover below in the District Court without having made the slightest attempt to show that the *decay* they complain of *could have been avoided* or *prevented by the carrier no matter how diligent and attentive to its duties it might have been.*

That the test in all such cases is whether the carrier *could have avoided or prevented the damage by diligence and attention* and *not* merely *whether some negligence sufficient to produce some or all of the damage has been proved on its part* is further evident from a still later case of this Court, viz., *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427. In that case Mr. Justice McKenna, in delivering the Court's opinion, said at page 432:

> "The carrier cannot contract against the effect of his negligence, and hence it is contended that in the case at bar the *burden of proof* is upon the *defendant* to show, that the fire was *not* caused by *its* negligence or that of *its servants.* The contention is answered in *Clark* v. *Barnwell,* 12 How. 272. In that case the bill of lading bound the carrier to deliver the goods in like good order in which they were received, dangers and accidents of the seas and navigation excepted. It was held that after the damage to the goods had been established the burden lay upon the carrier to show that it was caused by one of the perils from which the bill of lading exempted the carrier. But it was also held that, even if the damage so occurred, yet *if it might have been avoided by skill and diligence at the time the carrier was liable.* 'But', it was observed, 'in this stage and posture of the case the *burden* is upon the *plaintiff* to *establish* the *negligence* as the burden is

upon him.' *The* doctrine was affirmed in *Transportation Co.* v. *Downer*, 11 Wall. 129. See also section 218 (219) 2 Greenleaf on Evidence". (Italics supplied).

The other Federal Courts have long recognized the same principle, viz., that to defeat such an exception, once the loss has been brought within it, it is incumbent on the cargo owner to show, *not merely* that the carrier has been *negligent* and that such negligence was sufficient to produce some or all of the damage, but that *by the exercise of due care and diligence the carrier could have avoided and prevented the damage.* Thus in *The Isla de Panay*, 292 Fed. 723, affirmed in 267 U. S. 260, Rogers, *C. J.*, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, said at pages 728-729:

> "The general rule is that, where a loss arises from an excepted peril, the ship is *prima facie* excused, and can only be held liable upon *affirmative proof* that some negligence on the ship's part was the *efficient* cause of *the* loss. *Clark* v. *Barnwell*, 12 How. 272, 13 L. Ed. 985. In such cases the ship is discharged, unless convicted of negligence by a *preponderance of proof.* As was said in *The Lennox* (D. C.) 90 Fed. 308, if the cause of the injury is left in doubt, the ship stands excused, for the reason that by virtue of the exception in the bill of lading *the shipper in effect contracts that he will himself stand the risk of any loss arising from the cause named.*" (Italics supplied).

And in *United States* v. *M. Levy's Sons*, 288 Fed. 544, the Circuit Court of Appeals for the Fifth Circuit, by Walker, *C. J.*, said at page 545:

> "Though the damage resulted to the coffee from an excepted cause, yet *if it would have been avoided by the exercise of proper skill and diligence* the carrier was liable. *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 165-3; *Clark* v. *Barnwell*, 12 How. 272, 13 L. Ed. 985; *The Glenlochy* (D. C.) 226 Fed. 971. Evidence adduced called for

> the conclusion that, if the stowing and dunnaging of the cargo had been done in a different and entirely practicable manner, *the damage complained of would have been avoided.* * * * The vessel and its owner are liable for damages resulting from a negligent failure so to stow cargo as to protect it from injury by the ordinary contingencies of the voyage." (Italics supplied)

In *Wertheimer* v. *Penn. R. Co.* (C. C. S. D. N. Y), 1 Fed. 232, involving a case of damage by fire, which had been duly excepted in the contract of affreightment, Wallace, *C. J.*, said at page 234:

> "The effect of the contract made between the parties was to impose upon the *plaintiffs* the *burden* of proving that *the* loss of the goods by fire arose from the negligence of the defendant or its agents. In *Clark* v. *Barnwell,* 12 How. 272, Mr. Justice Nelson says: 'Although the injury may have been occasioned by one of the excepted causes in the bill of lading, yet still the owners of the vessel are responsible *if the injury might have been avoided by the exercise of reasonable skill and attention* on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted on the shipper to show the negligence'. [See syllabus.] In *Transportation Co.* v. *Downer,* 11 Wall. 129, the judgment of the Court below was *reversed* because the jury were *instructed* that it was incumbent upon the *defendant, the carrier,* to bring itself within the exception *by showing that it had not been guilty of negligence.* Other authorities to the same point need not be cited, as the cases referred to are conclusive upon this Court." (Italics supplied).

The same contention, there unsuccessfully urged as it was also unsuccessfully urged in *Cau* v. *Texas & Pacific Ry. Co., supra,* in this Court, viz., that the carrier can have the benefit of the exception only by affirmatively showing that negligence on its part was not the efficient cause of the loss, was successful below in the District

Court in the case at bar and has been urged again upon this Court. Obviously it lacks merit and emanates from a failure to appreciate the significance of the exception.

In *Wolff* v. *The Vaderland,* (D. C. S. D. N. Y.), 18 Fed. 733, Judge Addison Brown dealt with the same problem. At page 739 he said:

> "When the damage complained of is ascertained to be within any of the exceptions of the bill of lading, the *burden of proof* is then *changed,* and the carrier is *not* liable, *unless it be shown by the shippers 'that the damage might have been avoided by the exercise of reasonable skill and attention on the part of the persons conveying the goods;* for then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty.' *Clark* v. *Barnwell,* 12 How. 272, 280; *The Pereire,* 8 Ben. 301; *Wertheimer* v. *Penn. R. Co.,* 1 Fed. Rep. 232-234; *The Delhi,* 4 Ben. 345." (Italics supplied).

In the case at bar the petitioners made no attempt to show that the carrier by the exercise of reasonable skill and attention to its duties could have *avoided* or *prevented* the *decay* of the onion cargo. The most that they undertook to do, was to show that the alleged failure to keep the hatches and ventilators open at night in good weather was sufficient to cause some or all of the damage. That is far from showing that the carrier could by keeping the hatches and ventilators open at such times or by any other means reasonably within its power have *kept* the onions *from* decaying. Such, however, was the petitioners' burden; and, having failed to bear that burden, they cannot now properly complain of the enforcement of the exception as a valid term of the contract of affreightment.

To avoid the effect of the "decay" exception, the petitioners argue that unless it be construed as leaving the burden on the carrier to prove that the decay did *not*

happen as a result of the *latter's own negligence,* the carrier is in effect *exempting* itself from the effects of *its own negligence,* and, therefore, violating our national public policy. The same argument was urged, but unsuccessfully on this Court in *Cau* v. *Texas & Pacific Ry. Co., supra,* where Mr. Justice McKenna said at page 432:

> "The carrier cannot contract against the effect of his negligence, and *hence* it is contended that in the case at bar the *burden of proof* is upon the *defendant* to show that the fire was *not* caused by *its* negligence or that of *its servants.* The contention is answered by *Clark* v. *Barnwell,* 12 How. 272."

In support of their contention that the burden in the case at bar rested upon the carrier to show that despite certain negligence on its part the decay would have happened in any event, the petitioners cite various cases, none of which, as we read them, support their view. Thus, citing *Maghee* v. *The Camden & Amboy R. R. Co.,* 45 N. Y. 514, 523, they quote a paragraph from the opinion of Andrews, *J.,* at page 11 of their brief, which at first blush appears to support their claim. But an examination of the preceding half dozen paragraphs of the opinion beginning on page 522 show that what the court was there discussing was a case of *deviation,* wherein the carrier lost the benefit of all bill of lading exceptions and became an insurer. Accordingly, when, in the paragraph quoted, Judge Andrews said that "in such a case" the carrier would remain liable for any damage to the cargo unless *he* showed that the damage would have occurred in any event despite such "default, misconduct or deviation", and that "the burden of proof of this fact would be upon the carrier", the learned Judge was referring only to a case of *deviation* or *misconduct tantamount thereto, not* to a case of *ordinary negligence.*

That the rule in a case of *ordinary negligence* is *otherwise* appears from a decision of the same court announced

not more than six months later, viz., *Lamb* v. *Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271, 280. There the bill of lading contained an exemption of the carrier from liability for loss by fire. The goods carried were damaged by fire. Proof was submitted on the trial "tending to show negligence of the defendant". The trial judge instructed the jury in effect "that they should find for the plaintiff, unless satisfied, from the evidence, that the fire was not the result of the defendants' negligence" (281), to which instruction an exception was duly taken. The jury returned a verdict for the plaintiff. The judgment entered thereon, after having been affirmed by the General Term of the New York Common Pleas, was reversed by the Court of Appeals, which held the instruction to have been erroneous. Upon this point the Court of Appeals by Grover, *J.*, said, among other things:

"The court thereupon decided, that the burden of proof was on the defendant, to show that the destruction of the cotton by fire was not caused by negligence on its part. This was error. Although in proving the destruction of the cotton by fire, it appeared that the fire originated on a boat of the defendant laying at its dock, this was only evidence tending to show negligence of the defendant. Whether sufficient *prima facie* to entitle the plaintiff to a verdict is a question not necessary to decide, as no ruling thereon was made by the court" (280).

"The court, among other things, charged the jury, that, although the defendant had been free from their ordinary measure of responsibility as insurers, they are not relieved from the burden of satisfying you that this loss, which it is beyond doubt happened by fire, was not occasioned by negligence on its part" (280). "The idea plainly conveyed to the jury was, that they should find for the plaintiff unless satisfied from the evidence, that the fire was not the result of the defendants' negligence, thus leaving them to find for the plaintiff, if unable to determine whether the fire so resulted or not, *while the instruc-*

tion should have been to find for the defendant, unless they found, from all the evidence, that the fire was the result of the negligence of the defendant'' (281). (Italics supplied).

Other cases here relied upon by the petitioners such as *Liverpool Steam Co.* v. *Phenix Ins. Co., supra; The Folmina,* 212 U. S. 354; *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104; *The Edwin I. Morrison,* 153 U. S. 199, and the other cases cited at pages 8 and 9 of their brief; *The Portsmouth,* 9 Wall. 682, and *Corsar* v. *J. D. Spreckels, etc., Co.,* 141 Fed. 260, cited at page 11 of their brief; *The Mohler,* 88 U. S. 230; *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, cited at page 12; *The Mary Belle Roberts,* 22 Fed. Cas. 929, Cas. No. 13,240, cited at page 13; and *The Rona* (1884), 51 L. T. 28, cited at page 15, have no pertinency to the point here under discussion. For they were all cases in which the carrier had failed to show that the damage complained of fell *prima facie* within any bill of lading exception.

The distinction between that type of case and the one at bar is, indeed, pointed out in the very passage of Carver on Carriage of Goods by Sea that is cited by petitioners at page 15 of their brief. The learned author, in Section 78 of the 7th edition of his work, after pointing out in the first paragraph of that section the burden resting upon a carrier to bring himself within a bill of lading exception, if he would escape liability for cargo damage, continues in the following paragraph as follows:

"But in the case of loss apparently falling within an exception, the burden of showing that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, has been held to be upon the person so contending."

Once the carrier brings himself *prima facie* within a bill of lading exception, such as fire, breakage, decay or the

like, a task that is not particularly difficult, where as here, the arrived state of the merchandise itself shows the exception to be applicable, presumption can no more be indulged in against the carrier to create liability for that particular type of damage than it could be in the case of a private bailee for hire. *York Company* v. *Central Railroad* (*supra*), 112; *New Jersey Steam Navigation Company* v. *Merchants' Bank* (*supra*), 382; *Lamb* v. *Camden and Amboy R. R. & T. Co.* (*supra*), 278; *Moes Moliere & Tromp* v. *Leith and Amsterdam Shipping Co.*, 5 Sess. Cas. (3rd Series) 988, 991, 992, 996-998; *The Bencleuch*, 10 F. (2) 49, 51-52 (C. C. A. 2d Cir.); *The Ellerdale*, 10 F. (2d) 53, 54 (C. C. A. 2d Cir.).

In that situation, as District Judge, later Mr. Justice Blatchford, said in the case of *The Delhi*, 4 Ben. 345, 7 Fed. Cas. 413, 414, Cas. No. 3770, "not only" must negligence on the part of the carrier be shown, "*but it must be satisfactorily shown that the negligence proved was the cause of the damage alleged*" (Italics supplied).

That precisely is one of the barriers that the petitioners in the case at bar neither did, nor made any attempt to, surmount. They did not show "that the negligence proved was the cause of the damage alleged". They did not show that the damage of which they complained would not have happened just the same, even though the Vallescura's hatches and ventilators had never been unnecessarily closed. They did not show "that it might have been avoided by the use of proper precautionary measures".

The petitioners in the case at bar did not show that their onions were not already infected with bacteria and spohrs and inherently unsound and diseased at time of shipment. And they did not show that the necessary curtailment of ventilation for the period of five or six days at the port of Denia, after the great bulk of the onion cargo was already in the ship, was not sufficient to, and did not, set in active operation the "inherent principle of decay" in all those onions found decayed on arrival at New York.

Nor, apart from that, did they show that the necessary curtailment of ventilation during the six days during which the Special Commissioner found that the steamer's hatches and ventilators "were properly closed" was not sufficient to stir into activity the inherent principle of decay" in all those onions found decayed on arrival at New York. Nor did they show that the prolongation of the voyage by 50 per cent beyond its ordinary duration would not produce the same result.

The shipper himself conceded that if the hatches had to be kept down "for four or five days", "That would be sufficient" to spoil the onions (*supra,* 8; R. 211). By that he presumably meant such onions as were predisposed to decay. That he could not have meant all of the onions is obvious from the fact that, according to the Commissioner's findings, the hatches *and* ventilators were closed tight for a total period of sixteen days of twenty-four hours each *and yet the great majority of the onions arrived undecayed.* If, then, only those onions predisposed to decay were the onions found decayed on arrival at New York and all not so predisposed were found to be sound and in good condition at destination,—and, as the uncontradicted expert testimony in the case shows, there is no other explanation for such a wide difference revealed in the keeping quality of the onions (*supra,* 7; R. 138),—the proofs necessarily left it wholly conjectural whether all of the onions found decayed at New York would not still have been found to be decayed onions, even if there had been at no time any unnecessary closing of the steamer's hatches and ventilators.

A decayed onion is a decayed onion; and presumably would be unmarketable whether decayed little or much. The petitioners might conceivably argue that, even though only those onions decayed that by reason of inherent condition obtaining at port of shipment were susceptible to decay, and even though the protracted necessary and proper curtailment of ventilation might have set off the

process of decay in these onions, still they would not have been decayed *so much,* in the case of any particular onion, if there had been no unnecessary suspension of ventilation at night. But the difficulty with such an argument would be two-fold, viz.: First, there is no proof in the record that a slightly decayed onion would have been of any more value to them than a more extensively decayed onion; and, secondly, the record is quite barren of proof that, once the process of decay has been set off in an onion susceptible thereto, the process can be arrested or stayed by exposing the onion to air. Common experience proves the contrary to be true.

Nor may the petitioners properly contend that, even though the necessary closing of the steamer's hatches and ventilators would have in any event fanned into action the inherent principle of decay in those onions susceptible thereto, nevertheless, because the unnecessary closing of ventilators and hatches at night preceded the necessary closing of the same on the voyage, therefore it is to be presumed that it was the unnecessary curtailment of ventilation at night that in fact initially set the inherent principle of decay to working. Here again the petitioners are met with the difficulty that, if the subsequent necessary suspension of ventilation would have set the inherent principle of decay into action, as they must concede it might have, precisely the same onions would have been found decayed on arrival at New York as those which were in fact so found. And, in that event, the petitioners would have suffered no damage whatever as the result of the unnecessary curtailment of ventilation at night. Moreover, there is no basis in fact for any such argument; since concededly there was a very protracted and very necessary curtailment of ventilation for almost the whole of the onion cargo at the port of Denia before the Vallescura ever got under way.

Under these circumstances there can be, we submit, no question of the soundness of the decision of the Cir-

cuit Court of Appeals in this case. As it observed (R. 329-330):

"as the burden was on the libellants to prove not only that the onions had been damaged, but to prove recoverable damage it was necessary to prove what damage was caused by the negligence of the ship * * * When the problem appears in this form it is apparent that proof of negligence in this connection is not a question merely of showing that the ship did not provide adequate ventilation at all times when the weather permitted, but of showing in addition that the onions were damaged by decay which would not have occurred in spite of inadequate ventilation in good weather. To prove this necessarily required proof which would show what decay 'might have been avoided by the exercise of reasonable skill and attention on the part of the persons conveying the goods'. In failing to make such proof, the libellants failed to prove any recoverable damage."

"Having left the cause of the decay in doubt, the libellants left the ship excused."

The rule that, where damage has certainly resulted from a given wrong but is uncertain in amount, he that has caused the damage must be content with an approximation thereof, or, if that be impossible, bear the whole loss (*Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, and the other cases cited in petitioners' brief at pp. 19-22), has no application to the case at bar. That rule applies only where the damages are "definitely attributable to the wrong"; it has no application to "such as are not the certain result of the wrong". *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562-563.

" 'The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such

only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount' " (*id,* 563).

Here there was no damage that was "the certain result of the wrong"; none that was "definitely attributable to the wrong". The uncertainty here was as to source and origin; not merely as to amount. None of it was shown to have resulted "necessarily and immediately and directly from the breach."

The rule, moreover, is inapplicable for a still further reason. Where, as here, an agreement has been made between the parties to the effect that one rather than the other shall be "accountable for" a given kind of damage, which agreement presumably was in part entered into for the very reason of the difficulty normally to be encountered in *accounting for* and tracing such damage in whole or in part to a definite and certain source, the application of the rule would result, not in equity, which it was clearly meant to subserve, but in obvious inequity. It would violate the letter as well as the spirit of the parties' own agreement that the carrier should not be "accountable for" such damage. Where the parties themselves have by agreement fixed the rule to be applied in case of damage of a certain kind, and the same trenches upon no public policy, reason forbids that it should be sacrificed to one that might be appropriate in the absence of contractual relations and provisions.

POINT II.

The fault of the carrier here complained of was at worst a fault in management of ship from responsibility for which the carrier was relieved under the Harter Act.

The respondent satisfied both the District Court and the Circuit Court of Appeals that the Vallescura was "in all respects seaworthy and properly manned, equipped and supplied". It therefore made the point in both courts that, having supplied at the outset of the voyage a perfectly good ship possessing ample and adequate hatch and ventilating appliances, any failure, on the part of the crew, once the ship had gone to sea and their management, as distinguished from the owner's, had begun, to make proper use of those appliances, was at the worst no more than a fault in the management of the ship; and that the respondent was relieved from responsibility for any loss or damage resulting therefrom by virtue of the provisions of Section 3 of the Harter Act (Act of February 13, 1893, c. 105, § 3; 46 U. S. C. A. 192).*

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*In view of the fact that reference hereafter will be made to Section 1 of the Harter Act (46 U. S. C. A. 190), as well as Section 3 thereof, both Sections are here set out in full.

> 1. "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its

The point was ruled against the respondent in both courts. The District Court expressly found that the unnecessary closing of the hatches and ventilators in good weather was negligence "in the care and custody of the cargo" (R. 248). The Circuit Court of Appeals found: "This negligence was related primarily to the care of the cargo and not to the management of the ship. It was, therefore, not an error in management and navigation, but a failure in the performance of a duty owed to cargo from which the ship is not relieved from liability under the Harter Act" (R. 328).

The respondent submits that in so deciding and rejecting the proffered ground of defense both courts gravely erred. Such error, if in fact such it be, is here available to the respondent to sustain the decree of the Circuit Court of Appeals entered below. *Story Parchment Co.* v. *Paterson Co., supra,* 560.

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or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

3. "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, Acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The precise point, viz., whether the unnecessary closing of a steamer's ventilators and hatches in the nighttime at sea, is a fault in the management of the ship, has never previously been before this Court for decision. But this Court has held that the improper use at sea of other of the ship's permanent appliances almost identical with hatch and ventilator covers constituted a fault in management of ship, not in care of cargo. *The Silvia,* 171 U. S. 462, 466.

The parts of the ship mishandled in that case were four round ports on each side of the steamer and about eight or nine feet above the water line when the vessel was fully loaded. Each had a diameter of eight inches, an outer glass cover 5/8ths of an inch thick that was set in a brass frame and an inner shutter of iron. At least one of these appears to have opened directly into the hold in which the cargo of sugar there involved was carried. When the ship left port at the commencement of the voyage the glass covers alone were closed, the iron shutters being left open, since the weather was good and there was then no necessity of having them closed and since the cargo was so arranged in the holds that although the hatches were battened down it would be a comparatively easy task to remove the hatch covers, enter the cargo holds and close the iron shutters when bad weather threatened. To leave the iron shutters open in good weather did not render the ship unseaworthy; but otherwise in heavy weather.

In the afternoon of the day of sailing rough weather developed and the iron shutters should have been at once closed. But the crew neglected that duty, left them open and thus permitted the ship thereby to become unseaworthy for the cargo of sugar in bad weather.

As a consequence of such unseaworthiness in bad weather the glass cover on one of the ports was broken either by the force of the seas or by floating timber or wreckage and since that particular port opened into the hold in which the sugar was stowed the water that sub-

sequently entered through the broken port came in contact with the sugar and damaged it. The cargo owner sued the vessel for this damage.

The ship-owner defended on the ground that the failure to close the iron shutters in bad weather was a fault in the management of the steamer and not in the care of the cargo and therefore was a fault from responsibility for which the carrier was relieved by Section 3 of the Harter Act.

This ground of defense was accepted by Judge Addison Brown in the District Court as sound and determinative of the case. And he dismissed the libel accordingly (64 Fed. 608). In doing so the learned Judge pointed out the close similarity between the iron shutters for the ports and hatch covers on the deck and clearly indicated that the vessel owner would have been entitled to the same relief if, instead of the port covers, the hatch covers had been open in good weather and the crew had negligently failed to close them in bad. He said (608): "The duty to close the iron covers to prevent the breakage of the glass and the ingress of sea water was a duty appertaining exclusively to the 'management of the vessel, which devolved upon the officers of the ship' and the omission to close them was a 'fault or error in the management of the vessel' within the language of the act. *The omission was a fault of precisely the same nature as the omission to put on hatch covers would have been in a rough sea.* By the supply of proper ports, proper glasses and proper iron covers for the ports, *as in the supply of proper hatch covers,* the owner's duty of 'due diligence' was fulfilled; and if the officers of the ship, either at the moment of sailing or afterwards, omit to make use of the things supplied to put or keep the ship in a proper seaworthy condition for meeting the perils of the seas from time to time, such an omission seems to me purely a fault 'in the navigation or management of the vessel', for which the owner is not responsible under the recent act." (Italics supplied.)

Judge Brown's decision was affirmed in the Circuit Court of Appeals (68 Fed. 230). The case was then brought to this Court on certiorari and affirmed. Mr. Justice Gray writing the opinion for this Court clearly showed that the reasoning of Judge Brown was approved of. He said (466):

"This case does not require a comprehensive definition of the words 'navigation' and 'management' of a vessel, within the meaning of the Act of Congress. They might not include stowage of the cargo not affecting the fitness of the ship to carry her cargo. *But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas;* and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship." (Italics supplied.)

It is not difficult to gather from Mr. Justice Gray's opinion that, if the failure in that case had been a failure, on the coming on of bad weather at sea, to close open hatches with the covers provided for that purpose by the vessel owner or to put on open ventilators the covers similarly provided by the shore management and water had entered through such open hatches or open ventilators into the cargo hold in which the sugar was stowed, the result would have been precisely the same as it was. Indeed, among the English decisions cited and approved of in that opinion was that of *The Ferro,* (1893) P. 38. The actual holding in that English case was against the vessel owner since the damage there complained of was clearly due to bad stowage. The decision, therefore, was not in point for purposes of the decision in *The Silvia, supra;* but the discussion by Sir Francis Jeune, the President, as to what would constitute "management" was very much in point. He there said (45):

"It is not difficult to understand why the word 'management' was introduced, because, inasmuch as navigation is

defined as something affecting the safe sailing of the ship in the case I have referred to, it is easy to see that there might be things important to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. *Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation.*" (Italics supplied.)

Nor can it be reasonable to suppose that, if in *The Silvia,* the port covers had been left open in order to furnish ventilation, instead of light, to the cargo compartment, the result would have been any different. Likewise logic forbids, it would seem, that the result should have been any different if the sugar cargo in that case had required ventilation, whenever possible, through the open ports and the crew had, instead of failing to shut the same on the coming on of bad weather, failed to open them on the coming on of good weather and thereby damaged the cargo.

The lower federal courts accordingly in the earlier decisions following *The Silvia, supra,* held that the failure of a crew at sea to close the steamer's ventilators with the covers supplied by the owner was a fault in management and navigation. *The Hudson,* 172 Fed. 1005, 1007-1008 (D. C. S. D. N. Y., 1909). In that case, where the claim was that goat-skins had been damaged by water entering through an open ventilator, it was held by Judge Adams that: "If there was any negligence in the management of the ship on the voyage in failing to cover the ventilators, or remove them and stop the tubes in rough weather, or in failing to keep the scuppers clear, the owner is exempted from liability by the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), having used due diligence to make the ship seaworthy at the outset of the voyage" (1007-1008). He dismissed the libel accordingly.

These decisions were quite in keeping with the contemporaneous trend of decisions in the British courts. Thus in *Rowson* v. *Atlantic Transport Co.*, (1903) 1 K. B. 114, affirmed in (1903) 2 K. B. 666, butter was shipped in insulated chambers connected with a steamer's refrigerating machinery. The machinery was in good working order and the ship in all respects seaworthy at the outset of the voyage, but during the course thereof the crew negligently operated the refrigerating machinery, allowed the temperature to rise unduly in the insulated chambers, and thus permitted the butter to spoil. Kennedy, *J.*, in the Court of Kings Bench, gave judgment for the vessel owner on the ground that the damage was due to a fault in "the management of the ship". The ground of his decision seems to have been substantially as follows: To satisfy his obligation of furnishing a ship seaworthy for the carriage of the butter the vessel owner had to furnish one with proper refrigerating appliances in good working order and capable of carrying the goods safely, apart from excepted perils, to destination. Having supplied such machinery and the ship having sailed, the operation of the refrigerating appliances had to be entrusted to the officers and crew. If, in operating them, they were so negligent as thereby to render the ship unseaworthy for the carriage of the butter, the fault was one in the management of the ship. If proper equipment and other requisites are supplied at the outset so as to render the ship seaworthy for the particular cargo, their improper use thereafter so as to render her unseaworthy for that particular cargo is an error of management.

At pages 116 and 117, after referring to certain authorities on the question of seaworthiness, Kennedy, *J.*, said: "In view of these authorities, it is to my mind clear that the word 'seaworthy' in the section of the Harter Act which is embodied in the bills of lading before me means fit to carry the particular cargo safely in respect of the dangers which but for proper fittings and equipment might damage it during the carriage.

"In the present case, upon the evidence before me, I am satisfied not only that the owners exercised due diligence to make the ship seaworthy in that wide sense, but that she was in fact in all respects seaworthy and properly manned, equipped, and supplied, and that the condition of the section was consequently satisfied.

"But, if the condition of the section would not be satisfied, and if the ship would be unseaworthy at the time of the shipment unless she was fitted with proper refrigerating machinery to keep the butter cool, then if during the course of the voyage she is rendered unseaworthy in respect of the safe carriage of the butter by the negligence of those in charge of the refrigerating machinery, I cannot escape from the logical conclusion that this negligence is, within the meaning of the Harter Act, negligence in the management of the ship of which that machinery is a part. This seems to be in accordance with the language of Gorell Barnes, *J.*, in *The Rodney*" ([1900] P. 112, 117), "where he said 'I think that the words "faults or errors in the management of the vessel" include improper handling of the ship as a ship, which affects the safety of the cargo'."

In the Court of Appeals, where this decision by Kennedy, *J.*, was affirmed ([1903] 2 K. B. 666), Vaughan Williams, *L. J.*, pointed out the close similarity existing between refrigerating appliances to keep cargo cool and ventilating appliances designed to achieve the same result, though in lesser degree. He said (675):

"Now, under those circumstances, if in this case we found that in the refrigerating chambers containing the butter some appliance had been placed simply for the purpose of refrigerating the butter, I should have hesitated very much to say that the refrigerating apparatus was part of the vessel, and I should, I think, not have been able to persuade myself to come to the conclusion that mismanagement of that special apparatus was a misman-

agement of the vessel; but it is not the fact here that this refrigerating machine was introduced into this ship with special reference to this butter. It was, to my mind, no more introduced into this ship with reference to this butter than the *port holes,* or *the removability of the hatches for the purpose of ventilation, or any other ventilating apparatus* could be said to be introduced for the purpose of a particular cargo." (Italics supplied.)

Such was the judicial view as to the inclusion in ship-management, as the term was used in the Harter Act, of the use of the ship's permanent ventilating appliances. Thereafter, at least so far as the lower federal courts were concerned, a conflict of views developed on the point. Thus, although in *Spang Chalfant & Co.* v. *Dimon S. S. Corporation,* 57 F. (2d) 965, 967, the Circuit Court of Appeals for the Second Circuit held that negligence in trimming ventilators so as to catch and convey to cargo such wind as was blowing was a fault in management, the same Court in *Andean Trading Co.* v. *Pacific Steam Nav. Co.,* 263 Fed. 559, reversing the District Court, held that failure to close open hatches with their appropriate covers on the coming on of bad weather, thereby permitting water to enter the holds and damage the cargo stowed therein, was a fault in care of cargo and not of ship-management. In so deciding the court followed a dictum by District Judge Dietrich in *The Jean Bart,* 197 Fed. 1002, 1005-1006 (D. C. D. Cal. S. D., 1911), which the District Court sitting in New York had refused to follow.

The departure from the current of judicial decision thus inaugurated by the dictum in *The Jean Bart, supra,* and followed in the *Andean Trading Co.* case, *supra,* was recognized as such in the former case, where the contrary views expounded in *Rowson* v. *Atlantic Transport Co., supra,* and *The Hudson, supra,* were specially referred to. The vessel involved in *The Jean Bart, supra,* was a French barque, which had undertaken to carry a number of crates of empty "Chianti" wine bottles from Antwerp, Belgium,

to San Francisco. Such bottles are of a distinctive type, being enclosed in wicker or straw covering, and on account of their peculiar shape could not be used for the purpose they were supposed to fulfill without such cover. The voyage consumed a period of five months, and because of the want of adequate ventilation the wickerwork on the bottles heated and decomposed. In the cargo owner's action to recover for the damage so caused, the District Judge held that the ventilating equipment was "very meagre and not reasonably adequate for such a voyage" (1004) and that: "It was the duty of the claimant to see that the Jean Bart was in respect to ventilation seaworthy for this particular voyage and this duty it is thought was not fully discharged" (1005). This initial unseaworthiness of the vessel in respect to her ventilating equipment was, of course, adequate to justify the decree entered for the libellant. And Judge Dietrich's subsequent discussion of whether failure to make proper use of the ship's ventilating appliances at sea was a fault in management of ship or care of cargo was pure dictum.

While recognizing that the views so expressed in this dictum were not in keeping with the views expounded in *Rowson* v. *Atlantic Transport Co., supra,* and *The Hudson, supra,* Judge Dietrich thought they were "not inconsistent with anything said or decided in *The Silvia", supra,* and that they found support in another case that had in the meantime been decided by this court, *Knott* v. *Botany Mills,* 179 U. S. 69. He also referred for support to *The Germanic,* 124 Fed. 1 (C. C. A. 2d Cir.), affirmed by this Court in 196 U. S. 589.

We believe that neither *Knott* v. *Botany Mills, supra,* nor *The Germanic, supra,* lends support to Judge Dietrich's dictum. On the contrary, the former case involved negligence in "stowage" of cargo; the latter, negligence in "delivery" of cargo. Neither was anything said by this Court in rendering those decisions that could properly, we believe, be construed as pointing in the direction of Judge Dietrich's dictum. On the other hand we find that

the opnion in the *Botany Mills* case was written by Mr. Justice Gray, who had also written the opinion for this Court in *The Silvia, supra,* to which case as well as *The Ferro,* approved of as pointed out *supra* in *The Silvia,* he expressly referred as distinguishing between matter of management and matter of mere stowage. Quoting from the remarks of Sir Francis Jeune in *The Ferro, supra,* Mr. Justice Gray said (74) " 'that mere stowage is an altogether different matter from the management of the vessel' " and added:

"The like distinction was recognized by this Court in the recent case of *The Silvia,* 171 U. S. 462, 466."

In *The Germanic,* where the negligence was in the delivery of the cargo, *The Silvia* also was referred to in the opinion written for this court by Mr. Justice Holmes. And, that no doubt was meant to be cast upon the soundness of the decision rendered in *The Silvia,* is quite evident from the remarks of Mr. Justice Holmes, who said (597):

"Nevertheless, in a practical sense, the ship" (*The Germanic*), "was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of the section, adopted by the court in *The Glenochil*" ([1896], P. 10), "and sanctioned by this court in *Knott* v. *Botany Mills,* 179 U. S. 69, 73, 74, to faults 'primarily connected with the navigation or the management of the vessel and not with the cargo.' [1896] Prob. 15, 19. In the case supposed the name given to the pigs of lead is not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make

it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

There is nothing, we submit, in this language, when construed with reference to the facts then before the court, that tends in the slightest to suggest that mishandling of the covers of hatches and ventilators by the crew of a ship at sea, regardless of the particular purpose that they may have in mind at the time, is ever anything other than a fault in management. The work in course of being done in *The Germanic* was delivery of cargo from the ship to the shore. It was in the course of the doing of that work and with an object to the effectuation of that work that the cargo was so displaced that the ship was rendered unseaworthy, turned turtle and sank. The want of care occurred in no sense in connection with the *transport of cargo at sea.*

A slight consideration of the history of the legislation resulting in the Harter Act reveals, we believe, that Congress never meant by the language used in Section 1 of the act to include therein such want of care of cargo as might occur at sea in connection with *the act of transportation.* As the bill (H. R. 9176) was originally reported out of the House when referred to the Senate the provision regarding care of cargo in Section 1 *did* prohibit bill of lading agreements relieving the carrier from the duty of exercising that particular kind of care, viz., "care in transport" (24 Cong. Rec. 147). The words "in transport" were stricken out in the Senate, leaving the character of care exacted by the section as so amended care generally in respect to those things specifically mentioned, viz., direct dealings with and upon the cargo such as "loading", "stowage" and "delivery". Care "in trans-

port'' was expressly excluded as one of the things to be exacted of the carrier by the statute.

The section as originally reported out of the House and referred to the Senate read: ''That it shall not be lawful for the manager, agent, master or owner • • • to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they, shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care *in transport,* or proper delivery of any and all lawful merchandise'', etc. (24 Cong. Rec. 147, italics supplied).

As amended in the Senate Committee on Commerce, by the omission of the words ''in transport'' (24 Cong. Rec. 1180) and certain other changes not pertinent to this discussion, the section read as set out *supra* (p. 35) (24 Cong. Rec. 1180). And, as so amended, the Bill passed the Senate (24 Cong. Rec. 1181), and went to conference between Senate and House (24 Cong. Rec. 1181). The Senate amendments were thereafter concurred in by the House (24 Cong. Rec. 1291, 1292) and the Bill was accordingly enacted into law without further change (24 Cong. Rec. 1321, 1339, 1603).

It thus appears clear that as the Bill was originally reported out of the House ''care in transport'' was one of the things aimed at, as well as care at the beginning and ending of the voyage, viz., care in loading, care in stowage and care in delivery. At that stage in the development of the legislation there was no purpose, it seems, to draw a sharp distinction between shore management and management of officers and crew at sea, and, while holding the vessel owner strictly liable for negligence in the former, to relieve him from negligence in the latter, so long as he could show that he used due diligence in management ashore. It was in the Senate Committee on Commerce that that new and important feature was worked into the Bill in Section 3 thereof. And it would seem to

be clear that it was because of this new turn given to the Bill in the Senate Committee that "care in transport" was stricken out of Section 1 as one of the objects of the legislation. With Section 3 embodying the new policy that the vessel owner, so long as he had diligently endeavored to supply a seaworthy ship, well manned, equipped and furnished, should no longer be liable for what his servants might do with the same when they proceeded on their voyage and passed out from under his direct control, it was obviously thought that it would be inconsistent, and no longer permissible, to retain in Section 1 "care in transport" as one of the very things from which the owner was not to be relieved.

In the light of this legislative history it would appear, then, that the care of cargo for which the owner was to be held in all events, was care relating particularly to the three sorts of cargo handling specifically named in Section 1, viz., "loading", "stowage" and "delivery"; and that such want of care as might occur at sea in the prosecution of the voyage and in the actual transporting of the cargo was not to be included. Not only is this conclusion necessitated by the striking out of the words "in transport" from Section 1, but such construction of the Act gives it a symmetry and consistency that it would not otherwise possess. Such a construction, indeed, is forecast in *May* v. *Hamburg Gesellschaft*, 290 U. S. 333, 345-346, where this Court, speaking by Mr. Justice Cardozo, has said: "he" (the shipowner) "must do what in him lies by the exertion of due diligence to make the vessel safe and sound. If the management of the ship is in the hands of master and crew, he will be relieved of liability for supervening losses, provided only that his own duty has been fulfilled at the beginning. If the term of management is over and the ship is in his hands again, the duty is renewed.

"*The question then is when management begins and ends.* Iron shutters are left open through the negligence of the crew while the ship is in a heavy sea. Liability for

the damage will not be chargeable to the owner, for this is a fault of management. *The Silvia,* 171 U. S. 462. Upon arrival at a port of call, the master is negligent in his inspection of the ship or its equipment. Liability for the damage will not be chargeable to the owner, for this again is a fault of management. * * * Arrived at distination, the engineer omits to close a valve, with resulting damage to the cargo. Once more, liability for the damage will not be chargeable to the owner, for this again is management. *The Wildcroft,* 201 U. S. 378. One has only to sketch these situations in order to perceive the gap dividing them from that before us here. Here is a case where master and crew have surrendered their management and have made appeal to the owner to resume control himself. * * * *Negligence at such a time is not the fault of servants employed to take the owner's place for the period of a voyage.* It is the fault of the owner personally, exercising his own judgment to determine whether the voyage shall go on."

The distinction, then, sought to be made by the Harter Act in Sections 1 and 3 is a distinction between the management of the owner and the management of the owner's servants. The question is "when management begins and ends" rather than the question, once the servants' management has begun and the ship is plowing the seas, whether the want of care is in respect to the cargo or the "transport" of the cargo or the ship. The act, we submit, neither necessitates, nor permits of, this distinction: That, if the act that the servants were engaged in doing, when negligent, looked to the safety of the ship, the fault is one of management; yet, if, in doing the very same act at another time, looking, however, at such time to the safety of the cargo, and not that of the ship, they are negligent, the fault is not one of management. Yet that is precisely the distinction that is made in the dictum of Judge Dietrich in *The Jean Bart, supra,* followed by the Circuit Court of Appeals for the Second

Circuit in *Andean Trading Co.* v. *Pacific Steam Nav. Co., supra.*

The latter case is, so far as we can find, the only case in which there has been an actual decision drawing such a distinction in the use of hatch and ventilator covers. There is a dictum to the same effect in *The Edith,* 10 F. (2d) 684 (C. C. A. 2d Cir.), a holding on the point having been unnecessary because of the finding of initial unseaworthiness. There is a dictum also to the same effect in *Barr* v. *International Mercantile Marine Co.,* 29 F. (2d) 26 (C. C. A. 2d Cir.). A similar dictum is to be found in *W. T. Lockett Co.* v. *Cunard S. S. Co.,* 21 F. (2d) 191 (D. C. E. D. N. Y.), a ruling on the point having been unnecessary because of the finding that due diligence had not been used to render the ship initially seaworthy. The decision in *The Skipton Castle,* 223 Fed. 839 (D. C. N. D. Cal., 1st Div.), did not touch upon the point since the hatch cover there in question was one not used to protect the ship from the elements but an inner cover designed for use in the hatchway from 'tweendecks to lower hold; and the negligence was apparently a failure in stowage as in the *Botany Mills* case, *supra.*

On the other hand the same Court that in the *Andean Trading Co.* case, *supra,* followed the dictum of Judge Dietrich in respect to the use of a vessel's ventilators and hatch covers, decided in *The Milwaukee Bridge,* 26 F. (2d) 327 (C. C. A. 2d Cir.), and in *United States* v. *New York & O. S. S. Co.,* 216 Fed. 61 (C. C. A. 2d Cir.), that failure on the part of the crew to open the hatch covers and make use of the hatches for entry into the cargo hold of a ship to inspect the cargo on suspecting the presence of damage therein and the need of taking steps to prevent its spread is a fault in management. And the same court in *The Merida,* 107 Fed. 146 (C. C. A. 2d Cir.), which in the *Andean Trading Company* case, *supra,* held it to be a fault not in management but in care of cargo to permit water to *enter* through improper use of the *hatch covers,*

held that it *was* a fault in management for the ship's crew *not* to use her *pumps* to *get the water out;* as was also ruled in *The British King,* 89 Fed. 872.

A vessel's pumps are, after all, much like her hatches and ventilators. The former are designed to get water out of the interior of the ship; the latter heated air. And, at the very least, it would seem that consistency would require that, if it is a fault of management not to use the pumps to get the water out of the ship, it is equally so not to use the ventilators to extract the heated air.

There is, we submit, no reason for the confusion, conflict and uncertainty thus prevailing among the decisions of the lower federal courts in respect to the question whether the misuse of a vessel's permanent appliances while she is actually engaged in transport at sea is a fault in management or a fault in care of cargo. Due regard for the broad policy of relief for ship owners embodied in Section 3 of the Harter Act and for the amendment of Section 1 made in committee the better to give effect to such policy, should produce, we submit, a uniformity of decision to the effect that any want of care of the cargo in transport is a fault in the management of the ship; and particularly so where such fault consists in the misuse and mishandling of any of the ship's permanent appliances. The test laid down in *The Germanic, supra,* as that whereby to determine the character of the fault as one of management or care of cargo was, it seems clear, never meant to be applied, except in connection with events occurring prior or subsequent to the transport of the cargo, and where, in connection with the "loading", "stowage" and "delivery" of the cargo, nice questions might often arise as to whether a given fault belonged in the one category or the other; in which case the answer would be found in "the primary nature and object of the acts which caused the loss" (*The Germanic, supra,* 598). With that construction of the rule there laid down, *The Silvia, supra,* is entirely consistent, holding, as it

does, that "navigation" and "management" of a vessel "includes, *at the least,* the *control, during the voyage,* of *everything with which the vessel is equipped* for the purpose of protecting her *and her cargo* against the inroad of the seas" (466, italics supplied).

We submit, therefore, that the decisions in *The Hudson, supra,* and *Spang Chalfant & Co.* v. *Dimon S. S. Corporation, supra,* are to be preferred to that made in the *Andean Trading Company* case, *supra,* and to the dictum in *The Jean Bart, supra.*

But, if the rule announced in *The Germanic, supra,* is to be extended to events occurring *at sea in connection with the transport* of the cargo, and only that use of a vessel's equipment is to be deemed an act of management which is designed to subserve the safety of the *ship* rather than that of the *cargo,* still, it seems clear, for the purposes of the case at bar the result would necessarily be the same. For here it cannot be denied that the fault lay in the closing of the ventilators at night. They were closed *not to save the cargo;* rather *to save the ship* through the sudden coming on of heavy weather in the nighttime and the ingress of water into the ship before the covers could be replaced on ventilators and hatches. The master well knew the importance of ventilation as is indicated by his entry in the ship's log for November 17th (R. 240). When he closed the hatches and ventilators therefore at night it could not be that he was acting in the interest of cargo. It could only be that he had in mind the welfare of the ship as a whole. As the uncontradicted proof put it, it is "the rule to close the ventilators so long as it is safe to do so *for the safety of the ship*".

But, were the question left in doubt as to the precise purpose that the master had in view in so closing the hatches and ventilators, petitioners could derive no benefit therefrom. For, after all, the burden was upon them to

establish negligence on the part of the ship's servants *for which the respondent would be answerable.* Having merely shown an act that might or might not have constituted such negligence, depending upon the primary purpose with which it was done, the petitioners' proof was lacking. To have the act deemed such negligence, it was necessary that they go further and show the *primary intent* that lay behind it.

Accordingly, in the case at bar, it makes no difference in the last analysis whether the rule of *The Germanic, supra,* be extended as the lower court sought to extend it to events occurring at sea in the course of the voyage and in connection with the transport, or whether that rule be construed, in line with *The Silvia, supra,* to apply only to those situations where owner management and servant management rub shoulders, that is, to events connected with the "loading", the "stowage" and the "delivery" of the cargo. In either event the act of the master in covering the hatches and ventilators at night was a fault, if at all, in management, for which the respondent is not in any event answerable in view of its having furnished a "safe and sound" ship, well and properly manned, equipped and supplied.

Finally, it is to be observed that we have not raised the point that the lower courts erred in finding that it was a fault of any sort to close the hatches and ventilators at night. In two very recent cases it has been held by the same District Court that for the master of a steamer to close the vessel's hatches at night is not a fault. *The Tergestea,* 54 F. (2d) 809, 810; *The La Drome,* 43 F. (2d) 241, 242. And in the case of *Adrian* v. *The Live Yankee,* 33 Hunt. Mer. Mag. (1855) 703, 1 Fed. Cas. 187, Cas. No. 88 (D. C. D. Cal.), it was held to be a matter of doubt whether ventilation is or is not of any utility to perishable cargo and whether it might not be dispensed with *in toto.* We have, however, refrained from raising the point here

because of the fact that both of the lower courts have held the suspension of ventilation in this case, though only at night, to have been a fault, and we take it that this Court would not be inclined to go behind the findings so agreed upon below.

POINT III.

The decree of the lower Court should be affirmed.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1934.

Harry Schnell and Samuel Schnell, co-partners doing business as H. Schnell & Co., Petitioners, *vs.* The Steamship "Vallescura", her engines, etc., Lloyd Mediterraneo.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 3, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioners brought suit in admiralty in the district court for Southern New York, to recover damages for injury to a shipment of onions on respondent's S. S. "Vallescura" from Spain to New York City. The onions, receipt of which in apparent good condition was acknowledged by the bill of lading, were delivered in New York damaged by decay. The vessel pleaded as a defense an exception, in the bill of lading, from liability for damage by "decay" and "perils of the seas," and that the damage "was not due to any cause or event arising through any negligence on the part of the vessel, her master, owner or agents."

On the trial there was evidence that the decay was caused by improper ventilation of the cargo during the voyage, and that the failure to ventilate was due in part to closing of the hatches and ventilators made necessary by heavy weather, and in part to the neglect of the master and crew in failing to keep them open at night in fair weather. The district court entered an interlocutory decree, adjudging that the libellants recover the amount of the damage sustained by them, caused by closing the hatches and ventilators during good weather, and appointing a special commissioner to ascertain and compute the amount of damage.

The commissioner, after hearing evidence, found that it was impossible to ascertain how much of the damage was due to want of ventilation in fair weather and how much to want of it in bad. But, after comparing the periods during which the ventilators were negligently closed with those during which they were open or

properly closed,[1] he stated: "It would seem, therefore, that the greater part of the damage must have been due to improper shutting of the hatches and ventilators," and concluded that as the vessel had failed to show what part of the damage was due to bad weather, the petitioner should recover the full amount of the damage. The district court, accepting the report of the commissioner as presumably correct, as required by Admiralty Rule No. 43½, 286 U. S. 572, found no basis for rejecting its conclusions and gave judgment to libellants accordingly. The Court of Appeals for the Second Circuit, reversed, 70 F. (2d) 261, holding that as the damage was within the clause of the bill of lading exempting the vessel from liability for decay, the burden was on petitioner to show what part of the damage was taken out of the exception, because due to respondent's negligence.

Although certiorari was granted, 293 U. S. —, to review this ruling of the court below, most of respondent's argument before us was given over to the contention that the record discloses no finding, by either court below, that any part of the damage was caused by respondent's negligence. The decision of the District Court was made before the promulgation of Rule 46½ in Admiralty, 281 U. S. 773, requiring the trial court to make special findings of fact. No formal findings were made, but in directing entry of the interlocutory decree, and after reviewing the evidence and commenting on the fact that the hatches and ventilators had been kept closed at night in fair weather, a circumstance which the trial judge declared established negligence in the care and custody of the cargo, he stated: "Thus it appears that this notoriously perishable cargo of Spanish Onions (*The Buckleigh,* 1929 A. M. C. 449, 450) was deprived of all ventilation during the nighttime, regardless of the state of the weather. Such treatment was obviously ruinous and must have caused substantial damage." We have no doubt that this was intended to be a finding that negligence in failing to provide proper ventilation was the cause of some of the damage and that, as such, it was adequately supported by evidence. The commissioner and the court below assumed it to be such and we so accept it.

[1]The voyage lasted twenty-three days. The commissioner found that during the voyage, day and night together, the hatches and ventilators were kept open only 170 hours, that they were properly closed 144 hours, and improperly closed for 238 hours.

The failure to ventilate the cargo was not a "fault or error in navigation or management" of the vessel, from the consequences of which it may be relieved by § 3 of the Harter Act of February 13, 1893, § 3, c. 105, 27 Stat. 445; § 192, Tit. 46, U. S. C. The management was of the cargo, within the meaning of §§ 1 and 2 of the Act, and not of the vessel, to which § 3 relates. *The Germanic,* 196 U. S. 589, 597; *Knott* v. *Botony Mills,* 179 U. S. 69, 73, 74; *The Jean Bart,* 197 Fed. 1002, 1006 (D. C.). Hence, we pass to the decisive question whether, in view of the presumptions which aid the shipper in establishing the vessel's liability under a contract for carriage by sea, it was necessary for the petitioners to offer further evidence in order to recover the damage which they have suffered. If, in the state of the proof which the record exhibits, recovery depends upon their ability to produce evidence which would enable the court to separate the amount of damage attributable to respondent's negligence from that attributable to the unavoidable failure to ventilate in bad weather, they have failed to do so and judgment must go against them. But if respondent can relieve itself from liability only by showing what part of the damage was due to sea peril, in that bad weather prevented ventilation, judgment must go against it for the full damages.

In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy. See Carver, Carriage by Sea (7th ed.) Chapt. I. It applies equally with respect to other exceptions for which the law permits him to stipulate. *Clark* v. *Barnwell,* 12 How. 272, 280; *Rich* v. *Lambert,* 12 How. 347, 357; *Propeller Niagara* v. *Cordes,* 21 How. 7, 29; *The Maggie Hammond,* 9 Wall. 435, 459; *The Edwin I. Morrison,* 153 U. S. 199, 211; *The Folmina,* 212 U. S. 354, 361. The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually un-

known to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. See *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 184; *Chicago & Eastern Illinois R. Co.* v. *Collins Produce Co.*, 249 U. S. 186, 192, 193; *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 379, 380.

To such exceptions the law itself annexes a condition that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it. *Liverpool & Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 438; *Compania de Navigacion La Flecha* v. *Brauer*, 168 U. S. 104, 117. This rule is recognized and continued in the first section of the Harter Act, which makes it unlawful to insert any clause in a bill of lading whereby the carrier shall be relieved of liability for negligence.

It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it. Such we may assume the rule to be, at least to the extent of requiring the shipper to give evidence of negligence where the carrier has sustained the burden of showing that the immediate cause of the loss or injury is an excepted peril. *Clark* v. *Barnwell*, 12 How. 272, 280; *Railroad Company* v. *Reeves*, 10 Wall. 176, 189, 190; *Transportation Co.* v. *Downer*, 11 Wall. 129, 134; *The Victory and The Plymothian*, 168 U. S. 410, 423; *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 432; *The Malcolm Baxter*, 277 U. S. 323, 334.

But this is plainly not the case where the efficient cause of the injury for which the carrier is *prima facie* liable is not shown to be an excepted peril. *The Mohler*, 21 Wall. 230, 234; *The Edwin I. Morrison, supra*, 211. If he delivers a cargo damaged by causes unknown or unexplained, which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of liability. It is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage. *Rich* v. *Lambert, supra*, 357; *The Maggie Hammond, supra*, 459; *The Folmina*, 212 U. S. 354, 361; *Chesa-*

peake & Ohio R. R. Co. v. *Thompson Manufacturing Co.*, 270 U. S. 416, 422, 423.

Here the stipulation was for exemption from liability for a particular kind of injury, decay. But the decay of a perishable cargo is not a cause; it is an effect. It may be the result of a number of causes, for some of which, such as the inherent defects of the cargo, or, under the contract, sea peril making it impossible to ventilate properly, the carrier is not liable. For others, such as negligent stowage, or failure to care for the cargo properly during the voyage, he is liable. The stipulation thus did not add to the causes of injury from which the carrier could claim immunity. It could not relieve him from liability for want of diligence in the stowage or care of the cargo.

It is unnecessary for us to consider whether the effect of the clause is to relieve the carrier from the necessity, in the first instance, of offering evidence of due diligence in caring for a cargo received in good condition, and delivered in a state of decay. See *The Hindoustan*, 67 Fed. 794, 795 (C. C. A. 2d); *The Patria*, 132 Fed. 971, 972 (C. C. A. 2d); *Loma Fruit Co.* v. *International Navigation Co., Ltd.*, 11 F. (2d) 124, 125 (C. C. A. 2d); *The Gothic Star*, 4 F. Supp. 240, 241 (D. C.). For here want of diligence in providing proper ventilation is established and it is found that the failure to ventilate has caused the damage. It is enough that the clause plainly cannot be taken to relieve the vessel from bringing itself within the exception from liability for damage by sea peril where the shipper has carried the burden of showing that the decay is due either to sea peril, in that bad weather prevented ventilation, or to the vessel's negligence. Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent. *The Folmina, supra.*

Similarly, the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril. *Corsar* v. *J. D. Spreckels & Bros. Co.*, 141 Fed. 260, 264 (C. C. A. 9th); *The Gualala*, 178 Fed. 402, 406 (C. C. A. 9th); *The Jeanie*, 236 Fed. 463, 472 (C. C. A. 9th); *The Excellent*, 16 Fed. 148 (C. C.); *Thompson* v. *The Nith*, 36 Fed. 383, 384

(C. C.); *Speyer* v. *The Mary Belle Roberts,* 22 Fed. Cas., No. 13,240 (D. C.); *Mainwaring* v. *Bark Carrie Delap,* 1 Fed. 874, 879 (D. C.); *The Aspasia,* 79 Fed. 91 (D. C.); *Knohr & Burchard* v. *Pacific Creosoting Co.,* 181 Fed. 856, 860 (D. C.); *The Charles Rohde,* 8 F. (2d) 506, 507 (D. C.); *H. E. Hodgson & Co., Ltd.* v. *Royal Mail Steam Packet Co.,* 33 F. (2d) 337 (D. C.). In each of these cases the carrier is charged with the responsibility for a loss which, in fact, may not be due to his fault, merely because the law, in pursuance of a wise policy, casts on him the burden of showing facts relieving him from liability.

The vessel in the present case is in no better position because, upon the evidence, it appears that some of the damage, in an amount not ascertainable, is due to sea peril. That does not remove the burden of showing facts relieving it from liability. If it remains liable for the whole amount of the damage because it is unable to show that sea peril was a cause of the loss, it must equally remain so if it cannot show what part of the loss is due to that cause. *Speyer* v. *Mary Belle Roberts, supra; The Rona,* 5 Asp. 259, 262; Carver, Carriage by Sea (7th Ed.), § 78, p. 114.

Since the respondent has failed throughout to sustain the burden, which rested upon it at the outset, of showing to what extent sea peril was the effective cause of the damage, and as the petitioners are without fault, no question of apportionment or division of the damage arises.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.